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No. 04-1379

In The
Supreme Court of the United States

CITY OF HEMET, DAVE QUINN, AARON MEDINA, DANIEL REINBOLT, NATE MILLER, PETER HEWITT, LEE EVANSON and HEMET POLICE DEPARTMENT,

Petitioners,

v.

THOMAS SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a guilty plea to the crime of interfering with a police officer based on multiple acts of resistance, including physical resistance, an element of which is lawful use of force by the officer, bar an excessive force complaint under *Heck v. Humphrey*, 512 U.S. 477 (1994) because the civil rights action would necessarily imply the invalidity of the state court conviction?

2. In addition to the three-factor test set out in *Graham v. Connor*, 490 U.S. 386 (1989) must the reasonableness of a police officer's use of force under the Fourth Amendment be evaluated in light of less intrusive alternatives?

3. Assuming *Tennessee v. Garner*, 471 U.S. 1 (1985) creates a specific standard for use of deadly force under the Fourth Amendment, is such force defined as that which carries a reasonable likelihood of causing death, or does it also include nonlethal force that may cause serious bodily injury?

4. Does use of a properly trained canine to bite and hold a suspect constitute use of deadly force under *Tennessee v. Garner*, 471 U.S. 1 (1985)?

LIST OF PARTIES

The parties to the proceeding below were the petitioners, City of Hemet, Dave Quinn, Aaron Medina, Daniel Reinbolt, Nate Miller, Peter Hewitt, Lee Evanson and Hemet Police Department, and respondent, Thomas Smith.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Hemet, Dave Quinn, Aaron Medina, Daniel Reinbolt, Nate Miller, Peter Hewitt, Lee Evanson and Hemet Police Department respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit sitting en banc entered in the above proceeding on January 10, 2005.

OPINIONS BELOW

The en banc opinion of the Ninth Circuit is reported at 394 F.3d 689 (9th Cir. 2005) and is reprinted in the Appendix hereto, pp. 1-37, *infra*.

The initial panel opinion of the Ninth Circuit is reported at 356 F.3d 1138 (9th Cir. 2004) and is reprinted in the Appendix hereto, pp. 38-69.

The order granting the Petition for Rehearing en banc is reported at 371 F.3d 1045 (9th Cir. 2004) and is reprinted in the Appendix hereto, p. 79.

The order granting Summary Judgment and final judgment entered by the United States District Court for the Central District of California that was initially affirmed by the panel decision and then reversed by the en banc decision was not reported. It is reprinted in the Appendix hereto, pp. 70-78.

The initial panel decision in the case was issued on January 29, 2004. Appendix ("App.") p. 38. Respondent Smith timely filed a petition for rehearing en banc and on June 9, 2004, the Ninth Circuit granted the petition for

rehearing en banc. App. p. 79. On January 10, 2005, the Ninth Circuit issued its en banc opinion reversing the judgment. App. p. 1.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of the Fourth Amendment to the United States Constitution, 42 U.S.C. § 1983 and California Penal Code section 148 are set out in the Appendix to this petition beginning at 80-81 pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

A. Background of the Action.

Thomas Smith sued the City of Hemet and various of its police officers for violation of civil rights under 42 U.S.C. § 1983, asserting that the officers used excessive force against him during the course of an arrest. The officers were summoned to the Smith residence when Mr. Smith's wife placed an emergency phone call stating that her husband was hitting her. When the officers arrived,

the plaintiff was standing on the front porch of the residence with his hands in his pockets. One of the officers ordered him to show his hands, and Smith refused, directing the officer to follow him. The officer advised Smith that he would approach, but only if Smith removed his hands from his pockets and showed that he had no weapons. Smith again refused to remove his hands from his pockets and entered his home.

The officer advised dispatch of what transpired, and Smith then reemerged onto the porch with his hands still in his pockets. The officer again instructed Smith to show his hands, and Smith complied, but then refused to follow an order to put his hands on his head and walked towards the officer. Smith asked the officer to approach and enter the home with him.

Several other officers arrived at the scene, including a canine handler. One of these officers instructed Smith to turn around and place his hands on his head and, once again, Smith refused to obey the order, despite the fact that he was advised that if he did not comply, the canine would be sent to subdue him and might bite. Smith was then sprayed with pepper spray. Smith responded with expletives, and attempted to reenter his residence, but his wife had locked the door. According to Smith, several officers moved onto the porch, grabbed him from behind in order to subdue him and pushed him to the ground. The handler ordered the canine to bite and hold Smith. The dog bit Smith on his right shoulder and neck area, and then clamped its teeth on his arm. The canine's teeth had been capped and were incapable of inflicting deep puncture wounds.

Smith then agreed to comply with the officers' orders and submit to arrest. Smith, however, admits that he was "curled up" in a fetal position in what he characterized as an attempt to shield himself from the dog and that one of his hands was tucked in somewhere still out of the officers' view. As a result, the officers again attempted to secure both arms, and the canine was instructed to bite Smith a second time. The dog was then ordered to release Smith, and the officers pulled him off the porch where he continued to shield one of his arms from the officers. The canine handler then ordered the dog to again bite Smith. Eventually, the officers secured both of Smith's arms with handcuffs.

Smith subsequently pled guilty to violation of California Penal Code § 148(a)(1), i.e., willfully resisting, delaying or obstructing a police officer in the discharge or attempted discharge of duty.

Smith filed a section 1983 action against the City and the defendant officers. Smith alleged that use of a canine constituted deadly force, and that the force was excessive under the Fourth Amendment. Defendants moved for summary judgment on several grounds, including the contention that Smith's guilty plea as to the resisting arrest foreclosed his civil rights action under *Heck v. Humphrey*, 512 U.S. 477 (1994). The district court agreed, and granted summary judgment based on *Heck*.

B. Proceedings in the Ninth Circuit.

Smith appealed. A three-judge panel of the Ninth Circuit affirmed in a 2-1 published decision. App. pp. 38-69. The majority held that plaintiff's action was barred by *Heck*, since, under California law excessive force by the

officer would preclude a criminal conviction for resisting arrest. Thus, success on plaintiff's excessive force claim would necessarily call into question his conviction, and run afoul of *Heck's* rule that a civil rights action may not be maintained which would imply the invalidity of a criminal conviction in the absence of the grant of habeas corpus or successful criminal appeal.

Smith then successfully petitioned the Ninth Circuit for rehearing en banc. App. p. 79. Following argument before the en banc panel, on January 10, 2005, the Ninth Circuit, in an opinion authored by Judge Reinhardt, reversed the grant of summary judgment. App. p. 1. The court held that *Heck* did not bar Smith's lawsuit, because he had engaged in various acts constituting resisting arrest, including several that took place prior to application of any force by the officers, and that Smith's state court guilty plea did not specify the factual underpinnings of his conviction. App. pp. 10-14. The majority therefore concluded that the defendants had not been able to demonstrate that Smith's guilty plea was premised on the same facts which formed the basis of his criminal conviction. *Id.*

The Court also held that a triable issue of fact existed as to whether use of a canine under these circumstances constituted a use of deadly force. The court declared that it was bringing the Ninth Circuit purportedly in line with other circuits in adopting the Model Penal Code definition of deadly force as force creating a substantial risk of death or serious bodily injury. App. pp. 26-30. In so holding, the court changed Ninth Circuit law on the question. In *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998), the Court had held that deadly force meant "force reasonably likely to kill."

The Ninth Circuit also held that in evaluating the reasonable use of force, a court must apply not simply the three factors announced in *Graham v. Conner*, 490 U.S. 386 (1989), i.e., the severity of the crime at issue, the threat posed by the suspect to the safety of officers or others, and the extent to which the suspect is actively resisting arrest or attempting to evade arrest by flight, but also "the availability of alternative methods of capturing or subduing a suspect." App. pp. 22-23.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. CERTIORARI IS WARRANTED BECAUSE THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN *HECK v. HUMPHREY* BY ALLOWING A CRIMINAL DEFENDANT TO COLLATERALLY ATTACK A CONVICTION BASED UPON A VOLUNTARY PLEA TO ALL FACTS SUPPORTING THE CONVICTION, AFTER WAIVING DIRECT ATTACK ON THE CONVICTION.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that a state prisoner's action for damages under 42 U.S.C. § 1983 arising from his purportedly unconstitutional conviction in state court was barred to the extent that success in the civil rights suit "would necessarily imply the invalidity of his conviction or sentence" unless "the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487. The Court's decision was premised on two grounds. First, the Court analogized to the common law tort of malicious prosecution:

> We think the hoary principle that civil court actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution. 512 U.S. at 486.

Second, the Court focused on the need to preserve the integrity of state and federal procedures for direct review of a conviction. It reaffirmed its holding from *Preiser v. Rodriguez*, 411 U.S. 475 (1973) that the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement is a habeas corpus action in federal court after exhaustion of state court post-conviction remedies. 512 U.S. at 481. The Court held that damages claims which necessarily implied the invalidity of a state court conviction were not cognizable under section 1983 for the same reason that an action for injunctive relief was not cognizable under section 1983 in *Preiser* – both would undermine federal habeas corpus and exhaustion of state post-conviction remedies as the specific federal remedy to challenge the validity of a conviction. 512 U.S. at 483.

Here, the district court applied *Heck* to bar Smith's action for excessive force against defendants because it was undisputed that under California law, lawful use of force by a police officer would be a prerequisite to a conviction for interfering with a police officer under California Penal Code section 148, and Smith had voluntarily pled guilty to violation of California Penal Code section 148 in state court. App. pp. 74-75. The initial three-judge panel of the Ninth Circuit agreed and affirmed the judgment. App. 38. However, the Ninth Circuit en banc majority then reversed the judgment, holding that because Smith engaged

in multiple acts which constituted resisting arrest and interfering with a police officer and the plea did not recite the specific facts on which it was based, defendants could not show that success in his federal civil rights action would "necessarily" imply the invalidity of his state court conviction. The en banc panel's reasoning and result are flatly inconsistent with this Court's decision in *Heck* and sharply undermine its application to the most common disposition of charges – a guilty plea.

A. Under California Law, a Guilty Plea Admits Every Element of the Charge, Bars Appellate Review of the Factual Basis for Conviction but Protects the Defendant from Further Prosecution for Acts Encompassed by the Plea.

The central premise of the en banc majority opinion is that Smith engaged in multiple acts that constituted interfering with a police officer in violation of California Penal Code section 148. App. pp. 10-13. The conduct ranged from disobeying the police officer's commands to leave the porch or take his hands out of his pockets, to physically resisting the officers' attempts to restrain him when placing him under arrest. As noted in the en banc dissenting opinion, in fact, under California law because Smith's conduct was continuous over a short period of time – slightly over five minutes – he could only be prosecuted for a single violation of section 148. *People v. McFarland*, 58 Cal. 2d 748, 760, 26 Cal. Rptr. 473, 376 P.2d 449 (1962); *People v. Simon*, 21 Cal. App. 88, 90, 131 P. 102 (1913). Indeed, acts as far as fifteen minutes apart have been considered to be "part of the same incident" and insufficient to "constitute two separate offenses . . . each of which

would require a separate charge." *People v. Jefferson*, 123 Cal. App. 2d 219, 221, 266 P.2d 564 (1954). *See also People v. Mota*, 115 Cal. App. 3d 227, 233, 171 Cal. Rptr. 212 (1981) [multiple acts of rape on a single victim within an hour constitutes one offense]. Contrary to the en banc majority's suggestion, prosecutors are not free to spin each act of resistance into a separate criminal charge.

But, in any event, even if such splitting of charges were permissible, the fact remains that by entering a general guilty plea Smith admitted all facts to support his criminal conviction. "A plea of guilty amounts to more than an out-of-court confession. Such a plea is an admission of every element of the offense to which the plea is entered, and amounts to a conclusive admission of the guilt of the accused." *People v. Johns*, 173 Cal. App. 2d 38, 42, 343 P.2d 92 (1959). Thus, while the corpus delicti rule requires that the prosecution prove the substantial facts underlying the crime, a "plea of guilty being a conclusive admission of guilt, raises no issue of fact and hence proof of the corpus delicti is unnecessary." *Id.*; *see also People v. Parker*, 196 Cal. App. 2d 704, 708-09, 16 Cal. Rptr. 718 (1961). The unqualified guilty plea relieves the prosecutor of the necessity of, and indeed, forecloses presentation of evidence as to specific violations. Moreover, there is no requirement that a trial court inquire into the factual basis of a plea that is "unconditioned upon receipt of a particular sentence or other exercise of the court's powers." *People v. Fairbank*, 16 Cal. 4th 1223, 1245, 69 Cal. Rptr. 2d 784, 947 P.2d 1321 (1997), *cert. denied*, 525 U.S. 861 (1998). Even when the plea is "negotiated," "there is no duty to establish on the record the existence and nature of the factual basis for a plea." *Id.*

By voluntarily pleading guilty, Smith himself relieved the prosecution of having to make a record, let alone prove the specific charges. And having voluntarily admitted to existence of *corpus delicti*, Smith then voluntarily waived the right to appeal the factual basis for the conviction, even though he retained the right to appeal the sentence or issues concerning the voluntariness of any plea bargain. Cal. Penal Code § 1237.5; *People v. Meyer*, 183 Cal. App. 3d 1150, 1157, 228 Cal. Rptr. 635 (1986) ["by pleading guilty, a defendant admits the sufficiency of the evidence establishing the crime, and is therefore not entitled to review on the merits"]; *People v. Hunter*, 100 Cal. App. 4th 37, 42, 122 Cal. Rptr. 2d 229 (2002) [same].

If a criminal defendant desires to limit the factual scope of a plea or preserve certain factual issues for appeal, then the defendant may enter a "slow plea," which occurs when "agreed-on evidence is presented to the court with the understanding that the defendant is not contesting guilt." California Criminal Law Procedure and Practice § 27.19, p. 683 (Cont. Ed. Bar 5th ed. 2009); *Bunnell v. Superior Court*, 13 Cal. 3d 592, 606, 531 P.2d 1086, 119 Cal. Rptr. 302 (1975) [submission to bench trial on partial trial transcript constitutes slow plea]; *People v. Enright*, 132 Cal. App. 3d 631, 183 Cal. Rptr. 249 (1982) [submission on facts stated in police report constitutes slow plea]; *People v. McGuire*, 1 Cal. App. 4th 281, 1 Cal. Rptr. 2d 846 (1991) [slow plea may be based on stipulation by counsel].

However, a criminal defendant such as Smith, faced with a criminal charge based on multiple acts, would have good reason not to limit the factual basis of a plea. This is because entry of the plea forecloses future prosecution for any of the acts that might form the basis for the charge, since jeopardy attaches for purposes of the Double Jeopardy

Clause. *People v. Sturdy*, 235 Cal. App. 2d 306, 314, 45 Cal. Rptr. 203 (1965); *People v. Mims*, 136 Cal. App. 2d 828, 830-31, 289 P.2d 539 (1955).

B. A Guilty Plea Is Not a Favorable Termination of Criminal Proceedings and Allowing a Section 1983 Claim Premised on Facts Subsumed within a General Guilty Plea Undermines the Integrity of the Criminal Process.

As noted, in *Heck* this Court found section 1983 claims arising from acts that formed the basis of a criminal conviction to be analogous to common law malicious prosecution claims, and hence require a litigant to show favorable termination of the criminal action. It is plain, however, that a guilty plea under these circumstances would not constitute a "favorable termination" to allow a malicious prosecution suit to proceed. As the Restatement of Torts makes clear, a "termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if . . . the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused. . . ." Restatement (Second) of Torts § 660 (1977). Indeed, even if a plea is equivocal, the fact that it has been entered and the plaintiff enjoyed the benefit of the bargain by having the charges terminated, bars a malicious prosecution action. *See* Restatement, § 660 com. c ["although the accused by his acceptance of a compromise does not admit his guilt, the fact of compromise indicates that the question of his guilt or innocence is left open. Having bought peace, the accused may not thereafter assert that the proceedings

have terminated in his favor"]; *see also Ash v. Ash*, 72 Ohio St. 3d 520, 523, 651 N.E.2d 945, 948 (1995) [dismissal of criminal charges based on negotiated terms not favorable termination for purposes of malicious prosecution action: "It would be unfair to a complaining witness to allow an accused to secure the dismissal of the criminal charges against him or her by consenting to a compromise and then take advantage of the termination by suing the complaining witness"]; *Yarbrough v. SAS Systems, Inc., et al.*, 204 Ga. App. 428, 429, 419 S.E.2d 507, 509 (1992) [nolo contendre plea bars malicious prosecution action because it "does not constitute a favorable termination of the prosecution" and such a plea "is a shield and not a sword"].

The rule applied by the *Smith* en banc majority also leads to an absurd result that flatly undermines the integrity of the state court conviction and the entire process of state court appellate review and subsequent federal habeas corpus review that this Court sought to protect in *Heck*. Under the rule articulated by the en banc majority, Smith could, as he did, insulate himself from further prosecution for all of the numerous acts he committed which were plainly violations of California Penal Code section 148 and then essentially repudiate the basis of that plea by simply filing a civil rights action and asserting that defendants had no proof as to which of the individual acts formed the basis of his conviction. Similarly, by having voluntarily decided to waive state court appellate review and, indeed, by doing so waive any right to federal habeas corpus by voluntarily pleading guilty, he is in a better position than a criminal defendant who goes to trial, loses, has his conviction affirmed, and who is then foreclosed from filing a civil rights action by *Heck*.

This transformation of the plea bargaining process into a heads-I-win, tails-you-lose proposition undermines the very integrity of the state and federal post-conviction remedial process that *Heck* sought to preserve. Moreover, given that the vast majority of criminal cases are disposed of by way of plea bargain, the point of which is to avoid protracted presentation of evidence to establish particular acts, the Ninth Circuit's decision essentially forecloses application of *Heck* to convictions based upon guilty pleas. Thus, the very category of criminal conviction that should most properly be barred by *Heck* – where the defendant *voluntarily* waives his right to dispute the validity of the underlying charges or directly appeal the factual basis of conviction – may be collaterally attacked by way of a federal civil rights action. It is difficult to discern a greater invitation to opening the floodgates of litigation in federal court.

It makes no sense to assert, as the Ninth Circuit does, that under these circumstances, where the plaintiff took every step to avoid presentation of evidence of specific charges in the criminal case, the burden shifts to defendants to somehow prove the factual basis of the conviction.

Consistent with *Heck*, under these circumstances California law makes it clear that it is the plaintiff, not the defendant who bears the burden of attempting to get around a general conviction in order to avoid a determination that a successful civil rights suit would "necessarily" imply the invalidity of the conviction. In *Susag v. City of Lake Forest*, 94 Cal. App. 4th 1401, 1405-06, 115 Cal. Rptr. 2d 269 (2002), the plaintiff asserted a section 1983 claim for excessive force based on assertions that sheriff's deputies used excessive force during the course of his arrest – an arrest which subsequently led to a conviction

of one count of violating California Penal Code section 148. *Id.* at 1406. On appeal, the plaintiff argued as Smith does here, that he committed multiple acts of resistance during the course of arrest, any one of which could have formed the basis of his conviction, and contended that given the absence of the transcript of the criminal trial, it could not be determined which act formed the basis of his conviction. The Court of Appeal rejected the argument, holding that once defendants introduced evidence of plaintiff's valid and unchallenged conviction for violation of California Penal Code section 148, it was up to plaintiff to introduce affirmative evidence demonstrating that in fact his successful civil rights action would not imply the invalidity of his conviction under *Heck*. *Id.* at 1409-1410.

The result is that an action such as Smith's here would be barred in California state court, since the state trial court would have to follow *Susag*. In contrast, the federal district courts in California are bound by the en banc decision here, which necessarily means that forum selection will be outcome determinative in excessive force claims following conviction by guilty plea for violation of California Penal Code section 148. Concurrent jurisdiction of such claims would become a farce, and the federal courts will by default become the sole forum for such claims, since no plaintiff's lawyer would want to risk dismissal in state court when they would have a free pass on *Heck* in federal court.

Although the channeling of California excessive force claims into federal court and the conflict with California authority itself would warrant review by this Court, the Ninth Circuit's decision has implications far beyond California. This Court has not directly addressed the extent and manner to which *Heck* applies to convictions

based on guilty pleas, and the rule announced by the Ninth Circuit, as noted, clearly undermines application of *Heck* to the most common disposition of criminal charges. It is therefore essential that this Court grant review in order to clarify the standards governing application of *Heck* to guilty pleas.

II. CERTIORARI IS WARRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT THE REASONABLENESS OF AN OFFICER'S USE OF FORCE MUST BE EVALUATED IN LIGHT OF LESS INTRUSIVE ALTERNATIVES DIRECTLY CONFLICTS WITH THE THREE-FACTOR TEST OF *GRAHAM v. CONNOR*, THIS COURT'S EXPRESS REJECTION OF THAT PRINCIPLE IN FOURTH AMENDMENT CASES, AND THE DECISIONS OF THE OTHER CIRCUITS REJECTING SUCH ANALYSIS IN EXCESSIVE FORCE CASES.

As the Ninth Circuit recognized, in *Graham v. Connor* this Court announced a three-factor test in evaluating the reasonableness of an officer's use for force under the Fourth Amendment. (App. p. 18.) Specifically, the Court acknowledged that in *Graham*, this Court held that the relevant factors included "'[1] the severity of the crime at issue [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.'" App. pp. 18-19, citing *Graham v. Connor*, 490 U.S. at 396.

However, in a bit of judicial sleight of hand, the Ninth Circuit, created an additional standard for assessing use of force under the Fourth Amendment. The Court announced

that in "some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider." App. p. 19. The Court then found there was a triable issue of fact in this case as to the officers' use of force, since Smith offered "expert" testimony to the effect that the "officers could and should have used control holds to complete the arrest rather than to sic Quando on him once they had him restrained on the ground." App. p. 23. In sum, the Court agreed with Smith's contention that reasonableness of the officer's conduct must be evaluated in light of whether there were "alternative techniques available for subduing him that presented a lesser threat of death or serious injury." App. p. 22.

In writing for the Court in *Smith*, Judge Reinhart cites only a single case which purports to support this new standard for assessing reasonableness – his own opinion in *Chew v. Gates*, 27 F.3d 1432, 1441 n.5 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). App. pp. 19, 22.

The conspicuous lack of authority for the Ninth Circuit's creation of a "least intrusive alternative" test for evaluating use of force under the Fourth Amendment is not surprising, for it is contrary to the decisions of this Court and other federal appellate courts.

A. A "Less Intrusive Alternatives" Standard Is Inconsistent with *Graham's* Standards for Evaluating Use of Force, and this Court's Rejection of Such a Standard in Other Fourth Amendment Cases.

In *Graham*, the Court carefully limited the three critical factors to be assessed in evaluating the use of force

by police officers. That analysis is a narrow inquiry, i.e., whether the particular use of force was in and of itself reasonable in light of the limited three factors, i.e., the severity of the crime, the threat posed by the suspect, and whether the suspect is actively resisting arrest or attempting to flee. 490 U.S. at 396. If a particular use of force is reasonable in light of those three factors, it is irrelevant whether some lesser means of force might also be reasonable. Thus, the Ninth Circuit's creation of an additional standard is flatly inconsistent with *Graham*.

Moreover, this Court has expressly rejected a "less intrusive alternative" test in the context of other seizures under the Fourth Amendment. In *Illinois v. Lafayette*, 462 U.S. 640 (1983), the Court held that a police officer's inventory search of an arrestee's handbag during booking at the police station for purposes of assuring that no contraband entered the jail and to protect against theft claims against officers was reasonable under the Fourth Amendment. The Court rejected the contention that the availability of a lesser intrusive alternative – simply sealing the handbag within a plastic bag or box and placing it in a secured locker – had any impact on the reasonableness of the inventory search under the Fourth Amendment. This Court observed that the "reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." 462 U.S. at 647. In so holding, this Court observed that in *Cady v. Dombrowski*, 413 U.S. 433 (1973) in upholding the search of a trunk of a car to find a revolver suspected of being there, it had rejected the similar contention that the public would be equally well protected by simply posting a guard over the car, and held:

> [T]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not by itself, render the search unreasonable. *Illinois v. Lafayette*, 462 U.S. at 648, quoting *Cady*, 413 U.S. at 447.

Numerous cases of this Court reaffirm this principle. *See Skinner v. Railway Labor Executives Association, et al.*, 489 U.S. 602, 629 n.9 (1989) [upholding federal railroad administration drug and alcohol testing, and rejecting argument that the availability of less intrusive means must be considered for Fourth Amendment purposes, citing *Illinois v. Lafayette*]; *Colorado v. Bertine*, 479 U.S. 367, 373-74 (1987) [upholding inventory search of contents of van and rejecting contention that existence of other less intrusive means to secure the van did not render the search unlawful under the Fourth Amendment].

This Court's rejection of a less intrusive alternatives test under the Fourth Amendment rests on its recognition that the "'logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers,' [citation], because judges engaged in post-hoc evaluations of government conduct 'can almost always imagine some alternative means by which the objectives of the (government) might have been accomplished.'" *Skinner v. Railway Labor Executives Association*, 489 U.S. at 629 n.9, quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-557 n.12 (1976) and *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985). That concern is particularly acute in the context of use of force by police officers, where hired gun experts with the luxury of time and 20/20 hindsight, are willing to opine as to what officers in the field faced with rapidly evolving circumstances and

the need to make a split second decision, could have or should have done. This second guessing encompasses everything from using different tactics such as retreating instead of confronting a suspect, to, as in this case, electing to attempt to continue to struggle with Mr. Smith instead of using a canine to help subdue him. Without question, the less intrusive alternatives test enumerated by the Ninth Circuit in *Smith* creates the very sort of problems this Court sought to foreclose by repeatedly rejecting it in other Fourth Amendment cases.

B. The Ninth Circuit's Adoption of a "Less Intrusive Alternatives Test" Conflicts with the Decisions of the Seventh, Eighth, Tenth and Eleventh Circuits.

The federal appellate courts have followed the decisions of this Court in repeatedly rejecting the contention that the availability of less intrusive means of effecting a seizure may be considered in determining the reasonableness of a police officer's use of force. The Ninth Circuit itself in *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994) had previously rejected a less intrusive alternatives test in evaluating use of force by police officers. Citing this Court's decisions in *Illinois v. Lafayette*, *supra*, and *United States v. Martinez-Fuerte*, the *Scott* court observed that "as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." 39 F.3d at 915.

However, although *Smith* cites other portions of *Scott* with approval, the en banc decision squarely departs from its clear holding regarding the less intrusive alternatives test as applied to use of force by police officers. In so doing,

Smith directly conflicts with the decisions of the Seventh, Eighth, Tenth and Eleventh Circuits. *See, e.g., Plakas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994) [affirming summary judgment for police officer in excessive force action arising from shooting of suspect who assaulted officer with a poker and rejecting contention that officer should have retreated, used tear gas or a canine to halt the assault: "There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers, to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first. . . . The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable"]; *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) [affirming summary judgment in favor of police officer in excessive force action arising from fatal shooting by police officers and upholding trial court's exclusion of expert testimony opining that the officers should have "responded in a different manner, or that the officers should have used a lesser degree of force": "The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively 'reasonable' under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be a less intrusive (or more prudent) such as waiting for a supervisor or the SWAT Team are simply not relevant to the reasonableness inquiry."];

Marquez v. City of Albuquerque, 399 F.3d 1216, 1222 (10th Cir. 2005) [affirming jury verdict in favor of defendants in excessive force action based on police officers' use of canine to halt fleeing suspect and upholding district court's exclusion of expert testimony opining that the officers were required to use the minimum amount of force necessary to effect the seizure and use of the canine was improper: "[T]he Fourth Amendment 'does not require (police) to use the least intrusive means in the course of a detention, only reasonable ones"]; *Menuel v. City of Atlanta*, 25 F.3d 990, 996-97 (11th Cir. 1994) [reversing order denying summary judgment to police officers and public entity where police fatally shot plaintiff's mentally disturbed child, and rejecting contention that police officers' use of other tactics might have avoided the shooting, thus rendering it unreasonable, since officers are not required to use the least intrusive or even less intrusive alternatives, citing *Plakas, supra*, 19 F.3d 1143].

The Ninth Circuit's application of a less intrusive alternatives test has significant adverse consequences for day-to-day policing which affects the safety of not simply police officers, but of the general public. As Judge Kozinski, writing for the Ninth Circuit in the now repudiated *Scott* decision observed:

> Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement

> would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. 39 F.3d at 916.

Moreover, adoption of a least intrusive alternative test in Fourth Amendment excessive force cases will lead to unduly protracted litigation, as experts are retained on both sides to opine on the various alternatives available to officers in any given situation and which among them constitutes the least intrusive and hence "reasonable." As noted, both the Eighth and Tenth Circuits have expressly held that such expert testimony is irrelevant in the context of an excessive force action precisely because there is no least intrusive alternative test under the Fourth Amendment. *Schulz v. Long*, *supra*, 44 F.3d at 649; *Marquez v. City of Albuquerque*, 399 F.3d at 1221-22. In contrast, in *Smith*, the Ninth Circuit expressly holds that such expert opinion as to least intrusive means is directly relevant to the reasonableness inquiry. App. pp. 22-23.

Few areas of police conduct are more critical than the standards governing use of force. In many cases it is quite literally a matter of life and death. The Ninth Circuit has departed from the controlling authority of this Court and, indeed, the other Circuit courts to consider the issue, in imposing a least intrusive alternative standard on use of force by police officers within the Ninth Circuit. It is necessary that this Court grant certiorari in order to resolve the conflict among the Circuits and bring the Ninth Circuit back in line with the decisions of this Court and the requirements of the Constitution.

III. CERTIORARI IS WARRANTED TO CLARIFY APPLICATION OF *TENNESSEE v. GARNER* AND RESOLVE A CONFLICT AMONG THE APPELLATE COURTS CONCERNING THE DEFINITION OF DEADLY FORCE, AND RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER USE OF A PROPERLY TRAINED POLICE DOG MAY CONSTITUTE DEADLY FORCE.

In *Tennessee v. Garner*, this Court held that a police officer's use of a firearm to apprehend a fleeing non-violent felon was subject to the Fourth Amendment's reasonableness requirement. 471 U.S. at 7. The Court then declared a Tennessee statute which allowed officers to use deadly force against non-violent fleeing felons unconstitutional as violative of the Fourth Amendment. 471 U.S. at 22.

Four years later, in *Graham v. Connor*, 490 U.S. 386, the Court expressly held that all claims that law enforcement officers have used excessive force must be analyzed under the Fourth Amendment and its "reasonableness" standard. 490 U.S. at 395. The Court then held that the factors to be considered in evaluating reasonableness were the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396.

Although *Graham* creates a general standard to evaluate all use of force under the Fourth Amendment, nonetheless, courts and litigants have viewed *Tennessee v. Garner* as creating a more specialized rule for deadly force. As one court observed: "The deadly/non-deadly distinction is significant in the Fourth Amendment context; under clearly established law, the use of deadly force is constitutional only

if, at minimum, a suspect poses an immediate threat to police officers or civilians." *Jarret v. Town of Yarmouth*, 331 F.3d 140, 149 (1st Cir. 2003), *cert. denied*, 540 U.S. 1017 (2003).

Thus, *Garner* is interpreted as creating a narrower standard for application of deadly force than the general standards governing other use of force as articulated in *Graham*. But to the extent *Garner* creates a more limited inquiry, it is plainly confined to cases involving the most extreme use of force by police officers – force which is reasonably likely to cause death. The Ninth Circuit's expansion of the definition of deadly force for Fourth Amendment purposes to include patently non-lethal force that is capable of inflicting "serious bodily injury" is inconsistent with *Garner* and flatly unnecessary under *Graham*. While lethal force in most all circumstances is equally capable of causing serious bodily injury, the converse is not necessarily true; that is to say, many applications of force by police officers might well be capable of causing "serious bodily injury" but not be likely to result in death. Given the general *Graham* standards, there is neither a justification nor any need to distort the plain meaning of deadly force as the term was used by this Court in *Garner* in an attempt to shortcut application of the *Graham* criteria.

The Ninth Circuit's express adoption of what it terms the Model Penal Code definition of deadly force, is inconsistent with this Court's decision in *Garner*. It also creates confusion regarding the standards to be used in evaluating a broad range of force used by police officers, none of which may be likely to cause death, but might, as argued by plaintiffs, be capable of causing serious bodily injury. More specifically, the Ninth Circuit's decision creates confusion

regarding use of a canine to bite and hold a fleeing suspect and, in fact, conflicts with the decisions of other circuits which, under these facts, have expressly held that use of a canine does not constitute use of deadly force.

A. To the Extent the Term "Deadly Force" Has a Special Meaning in the Context of the Fourth Amendment as Interpreted by this Court in *Garner*, it Cannot Embrace Force That Is Not Reasonably Likely to Result in Death.

In *Garner*, this Court addressed the extremely narrow question of whether a state statute that authorized the use of deadly force to apprehend a fleeing felon violated the Fourth Amendment. In holding that per se authorization of such force violated the Constitution, this Court repeatedly emphasized the deadly nature of the force employed by the officer in that case – use of a firearm. *See, e.g.*, 471 U.S. at 9 ["The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated on. The use of deadly force also frustrates the interest of the individual and of society, in judicial determination of guilt and punishment"]; *id.* at 10 ["(W)e are not convinced that the use of deadly force is a sufficiently productive means of accomplishing (law enforcement goals) to justify the killing of nonviolent suspects"]; *id.* ["the use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that the mechanism will not be set in motion"]; *id.* at 11 ["Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in

his own life"]; *id.* ["It is not better that all felony suspects die than that they escape"] *id.* ["It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead"].

Not surprisingly, in its most recent decision addressing use of deadly force under the Fourth Amendment, this Court described its limited holding in *Garner* as "it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.'" *Brosseau v. Haugen*, ___ U.S. ___, 125 S. Ct. 596, 598, 160 L. Ed. 2d 583 (2004).

To the extent that *Garner* can be construed as making "deadly force" a term of art for Fourth Amendment purposes, given *Garner's* clear focus on the lethal nature of the force at issue in the case, there is simply no basis for the Ninth Circuit or any other federal appellate court to expand the term to include any force that is likely to result in serious bodily injury regardless of whether it is reasonably likely to be lethal. Such an expansive definition is flatly inconsistent with *Garner*.

B. A Conflict Exists among the Federal Appellate Courts Concerning the Definition of Deadly Force as Used in *Garner*.

Although the *Smith* majority opinion asserts that its expansion of *Garner* to include force that is not reasonably likely to result in death and adoption of the Model Penal Code definition of deadly force brings the Court in line with the majority of circuits to consider the issue, review

of the cited cases belies that representation. While the cited cases contain references to the Model Penal Code, all of them concerned application of force that actually resulted in death, or force that is indisputably capable of causing death, such as use of a firearm. *See, e.g., Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) [death from hogtying]; *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 593 (7th Cir. 1997) [death of handcuffed suspect; no finding of deadly force]; *In re City of Philadelphia Litigation*, 49 F.3d 945, 966 (3d Cir. 1995), *cert. denied*, 516 U.S. 863 (1995) [dropping bomb on building resulting in eleven deaths]; *Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987) [shooting of suspect]; *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985) [suspect shot]; *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) [suspect dies from canine bite – canine not deadly force because not reasonably likely to cause death].

Moreover, although the majority cites *Mattis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976) (en banc) vacated as moot *sub nom., Ashcroft v. Mattis*, 431 U.S. 171 (1977), as supporting the proposition that the Eight Circuit applies the Model Penal Code definition of deadly force, in fact the Eighth Circuit has expressly adopted the Ninth Circuit's prior opinion in *Vera Cruz* limiting *Garner's* definition of "deadly force" to that reasonably likely to result in death.

In *Kuha v. City of Minnetonka*, 365 F.3d 590 (8th Cir. 2004), the plaintiff, who had been stopped in his car for driving under the influence of alcohol, fled his vehicle on foot and hid in a field of high grass. Defendant officers pursued him, and eventually sent into the field a canine who was trained to locate and then bite and hold a suspect. The dog found Kuha and, as he was trained to do, bit

him on the first body part he could reach, in this case the suspect's upper leg. In partially affirming summary judgment for defendants, the court expressly rejected the contention that use of a trained police dog in this context constitutes deadly force under *Garner*. The court "acknowle[d]ged some conflict within the case law as to whether the Model Penal Code definition of deadly force is appropriate for Fourth Amendment analysis." 365 F.3d at 598 n.3. The court then expressly stated that it agreed with the Ninth Circuit's prior decision in *Vera Cruz* in rejecting the Model Penal Code definition of deadly force:

> We find persuasive the reasoning espoused in *Vera Cruz*: 'The MPC is designed to govern criminal liability; *Garner*'s deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment. We decline to put police doing their jobs in the same category as criminals doing theirs. *Id.*, citing *Vera Cruz*, 139 F.3d at 662.

Thus, contrary to the en banc opinion's mischaracterization of the opinion, in *Kuha*, the Eighth Circuit expressly declined to embrace the Model Penal Code definition of deadly force in the context of the Fourth Amendment. There is therefore an express conflict among the federal appellate courts as to the definition of deadly force under *Garner*.

C. A Conflict Exists among the Federal Appellate Courts as to Whether Use of a Properly Trained Canine to Bite and Hold a Suspect Constitutes Use of Deadly Force.

The Ninth Circuit en banc opinion is even in conflict with those jurisdictions which employ the Model Penal

Code definition of deadly force as it pertains to use of a trained canine to bite and hold a suspect. Here, the Ninth Circuit declares the issue "open," and remands to the trial court for consideration of evidence on the issue. However, on the evidence before the Ninth Circuit here, other circuits have concluded that use of a police dog to bite and hold a suspect does not constitute deadly force. In *Robinette v. Barnes*, 854 F.2d 909, 912, the court held that even where the bite inflicted by the police dog resulted in death, deployment of the dog to bite and hold a suspect did not constitute use of deadly force under *Garner*. *See*, *id.* at 912, noting [that incident was "an extreme aberration from the outcome intended or expected"]. Moreover, in *Kuha v. City of Minnetonka*, *supra*, although the Eighth Circuit rejected application of the Model Penal Code definition of deadly force, nonetheless, it noted that even "under the MPC definition our ultimate conclusion remains unchanged: the use of a properly trained police dog in the course of apprehending a suspect does not constitute deadly force." 365 F.3d at 598 n.3; *see also Jarret v. Town of Yarmouth*, 331 F.3d 140, 148-49 [use of canine to apprehend fleeing non-violent suspect is not "deadly force" under *Garner*].

By necessity, on a daily basis police officers must make split-second decisions to employ a broad range of force that is not intended nor substantially likely to result in death in order to apprehend fleeing or resisting suspects, including deployment of a properly trained canine. It is critical that police officers be provided clear guidance as to the range of force that may be properly used. Prior to the Ninth Circuit's decision, the law with respect to use of a trained canine to apprehend and restrain a suspect, and avoid the need of police officers to risk physical harm by

grappling with a suspect who refuses to comply, had been clearly established. In addition, given *Garner's* narrow definition of deadly force, police officers were able to evaluate use of a broad range of non-lethal force under the basic three factor test of *Graham*. The Ninth Circuit's opinion is an open invitation for endless litigation of virtually every type of non-lethal force as to whether it causes "serious bodily injury" for purposes of invoking the *Garner* standard. The Ninth Circuit's decision has thrown confusion into the law and done so in a manner that directly adversely affects day-to-day police operations and burdens the courts with protracted litigation. It is therefore vital that this Court grant review.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS SMITH,

Plaintiff-Appellant,

v.

CITY OF HEMET, a municipal corporation; HEMET POLICE DEPARTMENT; LEE EVANSON; DAVE QUINN; AARON MEDINA; DANIEL REINBOLT; TRAINER; NATE MILLER; PETER HEWITT,

Defendants-Appellees.

No. 02-56445

D.C. No. CV-00-00811-VAP

OPINION

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted
October 14, 2004 – San Francisco, California

Filed January 10, 2005

Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Stephen Reinhardt, Andrew J. Kleinfeld, Sidney R. Thomas, Barry G. Silverman, William A. Fletcher, Richard A. Paez, Marsha S. Berzon, Jay S. Bybee, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

COUNSEL

Robert Mann, Esq. and Donald W. Cook, Esq., Los Angeles, California, for the plaintiff-appellant.

Julie H. Biggs, City Attorney, Hemet, California; Elizabeth R. Feffer, Esq., Burke, Williams & Sorensen, LLP, Los Angeles, California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

We took this case en banc to clarify the law regarding whether, under *Heck v. Humphrey,* 512 U.S. 477 (1994), a § 1983 action for excessive force is necessarily barred by a plaintiff's conviction under California Penal Code § 148(a)(1) for willfully resisting, delaying, or obstructing a peace officer in the performance of his duties. We also take this occasion to bring our circuit into line with the others with respect to the definition of "deadly force."

Thomas Smith appeals the district court's order granting the defendants' summary judgment motion in his § 1983 action for excessive use of force. We reverse and hold that Smith's § 1983 action is not barred by *Heck* because the excessive force may have been employed against him subsequent to the time he engaged in the conduct that constituted the basis for his conviction. In such circumstance, Smith's § 1983 action neither demonstrates nor necessarily implies the invalidity of his conviction. We also hold that in this circuit "deadly force" has the same meaning as it does in the other circuits that have defined the term, a definition that finds its origin in the Model Penal Code. We define deadly force as force that creates a substantial risk of causing death or serious

bodily injury. We reverse the grant of summary judgment and remand to the district court.

I. FACTUAL AND PROCEDURAL HISTORY

The facts of the encounter between Smith and the police are not seriously disputed. To the extent that there is a difference between the parties, however, we look to the version most favorable to the plaintiff, the non-moving party. On the night of August 16, 1999, Smith's wife placed an emergency phone call to the Hemet Police Department ("Department") reporting that her husband "was hitting her and/or was physical with her." Mrs. Smith informed emergency personnel that her husband did not have a gun, there were no weapons in the house, and he was clad in his pajamas.

Officer Daniel Reinbolt was the first officer to arrive at the house in order to investigate the incident. He observed Smith standing on his front porch and "noticed Smith's hands in his pockets." The officer announced himself and instructed Smith to remove his hands from his pockets. Smith refused, responding with expletives and directing Officer Reinbolt to come to him. Officer Reinbolt informed Smith that he would approach, but only after Smith removed his hands from his pockets and showed that he had no weapons. Smith again refused to remove his hands from his pockets and instead entered his home.

After Officer Reinbolt advised dispatch of what had transpired, Smith reemerged onto the porch with his hands still in his pockets. Officer Reinbolt again instructed Smith to show his hands. Smith complied with this instruction, but then refused to follow an order to "put his hands on his head and walk towards [the officer's] voice[.]"

Instead, Smith again asked Officer Reinbolt to approach and enter the home with him.

Officer Nate Miller arrived in response to Officer Reinbolt's radioed request for assistance. Observing Smith's refusal to cooperate with Officer Reinbolt, Officer Miller contacted dispatch to request additional assistance, including a canine unit. Officer David Quinn, a canine handler with the Department, arrived shortly thereafter with "Quando," a police canine. Officer Aaron Medina also responded to one of the assistance calls.

Officer Quinn instructed Smith to turn around and place his hands on his head. Smith again refused to obey the order, despite being informed that Quando could be sent to subdue him and might bite. Without further warning, Officer Quinn sprayed Smith in the face with pepper spray. Smith responded with expletives and attempted to reenter his residence, but the door had been locked by Mrs. Smith. Several more officers then moved onto the porch, grabbed Smith from behind, slammed him against the door, and threw him down on the porch; Officer Quinn ordered the canine to attack him. Quando bit Smith on his right shoulder and neck area. At some point, either before or after the order to attack, the dog sank his teeth into Smith's arm and clung to it.

With at least four officers surrounding him and Quando's teeth sunk into his shoulder and neck, Smith agreed to comply with the officers' orders and submit to arrest. Although Smith submitted, he admits that he was "curled up" in a fetal position in an attempt to shield himself from the dog and that one of his hands was "tucked in somewhere," still out of the officers' view. As one of the officers attempted to secure both arms, Quando was

instructed by Officer Quinn to bite Smith a second time; this time the dog bit Smith on his left side and shoulder blade. Upon Officer Quinn's order, Quando ultimately retreated, and the officers dragged Smith off the porch, face down. Once off the porch, Smith continued to shield one of his arms from the dog's attack. Officer Quinn then ordered Quando to bite Smith a third time. This time, the dog bit into Smith's buttock. While all this was transpiring, Smith was pepper-sprayed at least four times, at least two of which sprayings occurred after the police dog had seized him and broken his skin, and at least one after the officers had pinned him to the ground.

Eventually, the officers secured the handcuffs on both of Smith's arms. Officer Reinbolt then washed Smith's eyes out with water from a nearby hose, but did not cleanse the wounds he received as a result of the dog bites.[1] Paramedics arrived shortly thereafter and attended to Smith's injuries.

Smith pled guilty in California Superior Court to a violation of California Penal Code § 148(a)(1).[2] Section 148(a)(1) provides: "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge

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[1] Although the dissent is correct that Officer Reinbolt's tape recording of the encounter between Smith and the Hemet police is about 5 minutes and 13 seconds, it neglects to mention that the tape which constitutes a part of the record is only a partial recording of the encounter. The tape, introduced by Smith, does not begin until some point after he returned to the porch from inside the house. The record is unclear as to the duration of the entire encounter. Suffice it to say that we know, given the declaration and depositions in the case, that it was substantially longer than five minutes.

[2] Smith also pled guilty to spousal battery under California Penal Code § 243(e). That conviction is not at issue in this case.

or attempt to discharge any duty of his or her office or employment, . . . shall be [guilty of a misdemeanor]." Smith was sentenced to 36 months' probation.

Smith filed a complaint under 42 U.S.C. § 1983 in the District Court, alleging that the officers used excessive force when they sprayed him with pepper spray and sicced the police canine on him. The defendants moved for summary judgment on several grounds, among them that *Heck v. Humphrey* bars Smith's § 1983 action and that the challenged use of force – the pepper spray and police dog – was appropriate and reasonable under the circumstances. The district court granted summary judgment on the basis that *Heck* barred Smith's § 1983 action. Judgment for the defendants was entered, and Smith filed a timely Notice of Appeal.

II. DISCUSSION

A. The Alleged *Heck v. Humphrey* Bar

In *Heck v. Humphrey,* the United States Supreme Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. . . . A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is *not* cognizable under

> § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed. . . .

512 U.S. at 486-87. *Heck* says that "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed." *Smithart v. Towery,* 79 F.3d 951, 952 (9th Cir. 1996). As the Supreme Court explained, the relevant question is whether success in a subsequent § 1983 suit would "necessarily imply" or "demonstrate" the invalidity of the earlier conviction or sentence under § 148(a)(1). *Heck,* 512 U.S. at 487; *see also Cunningham v. Gates,* 312 F.3d 1148, 1153-54 (9th Cir. 2003) (as amended) (*Heck* bars suits "based on theories that 'necessarily imply the invalidity of [the plaintiff's] convictions or sentences.'") (quoting *Heck,* 512 U.S. at 487). We conclude that success in Smith's action would not give rise to any such necessary implication.

Under California Penal Code § 148(a)(1), "[t]he legal elements of a violation . . . are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." *In re Muhammed C.,* 95 Cal. App. 4th 1325, 1329 (Cal. Ct. App. 2002) (citations omitted). For a § 148(a)(1) conviction to be valid, a criminal defendant must have "resist[ed], delay[ed], or obstruct[ed]" a police officer in the *lawful*

exercise of his duties. In California, the lawfulness of the officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer. *See People v. Curtis,* 70 Cal. 2d 347, 354-56, 357 n.9 (1969); *Susag v. City of Lake Forest,* 94 Cal. App. 4th 1401, 1409 (Cal. Ct. App. 2002). "If the officer was not performing his or her duties *at the time of the arrest,* the arrest is unlawful and the arrestee cannot be convicted under Penal Code section 148, subdivision (a)." *Id.* (emphasis added).

Excessive force used by a police officer at *the time of the arrest* is not within the performance of the officer's duty. *Id.; People v. Olguin,* 119 Cal. App. 3d 39, 45-46 (Cal. Ct. App. 1981) (*"[A]n arrest made with excessive force* is equally unlawful. '[It] is a public offense for a peace officer to use unreasonable and excessive force *in effecting an arrest.'"*) (citation omitted) (emphasis added); *People v. White,* 101 Cal. App. 3d 161, 167 (Cal. Ct. App. 1980) ("Thus, in the present case it becomes essential for the jury to be told that if they found the *arrest was made with excessive force,* the arrest was unlawful and they should find the defendant not guilty of those charges which required the officer to be lawfully engaged in the performance of his duties ([Cal. Penal Code] §§ 245, subd. (b), 243 and 148).") (emphasis added).

Under the definitions set forth in the California cases listed above, "the time of the arrest" does not include previous stages of law enforcement activities that might or might not lead to an arrest, such as conducting an investigation; it includes only the time during which the arrest is being *effected.* A conviction for resisting arrest under § 148(a)(1) may be lawfully obtained only if the officers do not use excessive force *in the course* of making that arrest. A conviction based on conduct that occurred *before* the

officers commence the process of arresting the defendant is not "necessarily" rendered invalid by the officers' subsequent use of excessive force in making the arrest. For example, the officers do not act unlawfully when they perform investigative duties a defendant seeks to obstruct, but only afterwards when they employ excessive force in making the arrest. Similarly, excessive force used *after* a defendant has been arrested may properly be the subject of a § 1983 action notwithstanding the defendant's conviction on a charge of resisting an arrest that was itself lawfully conducted. *See, e.g., Sanford v. Motts,* 258 F.3d 1117, 1119-20 (9th Cir. 2001) (explaining that a successful § 1983 suit based on excessive force would not necessarily imply the invalidity of Sanford's conviction under § 148(a)(1) because the officer's use of excessive force occurred subsequent to the conduct for which Sanford was convicted under § 148(a)(1)).

Defendants contend that *Heck* bars Smith's § 1983 action because the lawfulness of Smith's arrest was determined in the criminal action in which he voluntarily pled guilty. They urge that if Smith's allegations that he was subjected to excessive force during the arrest are now found to be true, that finding will necessarily imply the invalidity of his criminal conviction under § 148(a)(1). Because that conviction has not been reversed, expunged, declared invalid, or called into question by issuance of a writ of habeas corpus, defendants assert that Smith is precluded from pursuing his § 1983 claims.

Smith responds that the defendants unlawfully used excessive force against him *after* he had committed the acts on which his conviction was based, and thus that a verdict in his favor would not imply that his conviction was invalid. At the very least, Smith contends, the record

does not reflect which acts underlay his plea and therefore his § 1983 action is not *necessarily* inconsistent with his conviction. Accordingly, he urges, *Heck v. Humphrey* is not a bar. We agree.

The pertinent facts are as follows: Smith engaged in at least three or four acts in violation of § 148(a)(1) before the officers used force against him. These acts of willful resistance, delay, or obstruction occurred prior to the time that the officers had determined to arrest him for any criminal conduct. Indeed, they occurred in the course of the officers' *lawful* performance of their duty to investigate whether an offense had occurred. The acts by Smith include twice refusing to take his hands out of his pockets, reentering his home once; repeatedly refusing to put his hands on his head and come down off the porch, and, finally refusing to put his hands on his head and turn around. Each of these acts constituted a violation of § 148(a)(1) sufficient to warrant the filing of a criminal charge. Each could support a conviction under that section for obstructing the criminal investigation. *See, e.g., In re Muhammed C.*, 95 Cal. App. 4th at 1329-30 (holding that defendant violated § 148(a)(1) when he refused officers' repeated requests to step away from the patrol car); *People v. Green*, 51 Cal. App. 4th 1433, 1438 (Cal. Ct. App. 1997) (affirming § 148(a)(1) conviction in which defendant obstructed an investigating police officer by verbally intimidating a suspected victim because "the attempt to intimidate the suspected victim *impeded the investigation.* This is the very evil which the Legislature sought to proscribe by the enactment of section 148.") (emphasis added).

Defendants do not dispute that Smith violated § 148(a)(1) when he impeded their investigation by refusing to comply with their commands and that these acts by

Smith occurred before the officers came onto the porch and attempted to arrest him. Officer Quinn stated in his deposition that, based on his training and experience, he knew that Smith had violated § 148(a)(1) before the officers came onto the porch to make their arrest.[3] The City of Hemet's police practices expert also stated in his declaration that Smith had violated § 148(a)(1) multiple times before the defendant officers attempted to arrest him. Finally, at oral argument, counsel for the defendants made a similar concession.

While both parties agree that Smith violated § 148(a)(1) a number of times *before* the officers came onto

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[3] Specifically, Officer Quinn stated:

Q: When you were approaching Mr. Smith, he was still in disobedience of the officers' commands; is that right?

A: Sure.

. . .

Q: . . . Based on your training, what are the elements for making an arrest for a violation of Section 148 of the Penal Code?

A: Somebody has to obstruct, delay, or resist a police officer in the performance of their duties.

Q: Were the officers engaged in the performance of their duties as they were giving command to Mr. Smith to put his hands on his head and step off the porch?

A: Yes.

Q: Was Mr. Smith's noncompliance with those commands obstructing or delaying the officers in the performance of their duties?

A: Yes.

Q: So based on your training and experience, Mr. Smith – that is, by the time that you're approaching him on the porch – Mr. Smith had violated Penal Code Section 148.

A: Sure.

the porch to make their arrest, it is also the case that Smith subsequently violated the statute during the course of the officers' efforts to arrest him. Once the officers were on the porch, Smith again disobeyed their commands, both after he was sprayed with pepper spray and also immediately prior to the attacks by Quando. It is, thus, clear that if Smith pled guilty to § 148(a)(1) based on his behavior *after* the officers came onto the porch, during the course of the arrest, his suit would be barred by *Heck*. *See Heck,* 512 U.S. at 486-87. In such case, a successful § 1983 action by Smith would necessarily mean that the officers had used excessive force to subdue him and were therefore acting unlawfully at the time his arrest was effected. In that circumstance, Smith's conviction under § 148(a)(1) would have been wrongful and a successful § 1983 suit by him would demonstrate its invalidity. *See id.*

Under *Heck,* Smith would be allowed to bring a § 1983 action, however, if the use of excessive force occurred *subsequent to* the conduct on which his conviction was based. Specifically, Smith would be entitled to proceed below if his conviction were based on unlawful behavior that took place while he stood alone and untouched on his porch – that is, if his unlawful conduct occurred while the officers were attempting to investigate his wife's complaint. In such case, a judgment in Smith's favor would not necessarily conflict with his conviction because his acts of resistance, delay, or obstruction would have occurred while the officers were engaged in the lawful performance of their investigative duties, not while they were engaged in effecting an arrest by the use of excessive force.

The defendants' argument wrongly focuses on Smith's conduct rather than the officers'. There were two different

phases of the officers' conduct here – first, the investigative phase; then, when Smith repeatedly refused to cooperate, the arrest for violating § 148(a)(1) and for the underlying offense that otherwise might or might not have led to an arrest. The officers' allegedly unlawful conduct which transpired after they decided to use physical force to subdue Smith occurred during the second phase of their law enforcement activities, during the course of their effort to take Smith into custody. Prior to that time, during the investigative phase, they had issued only verbal commands, all of which were concededly well within the bounds of their general police powers. Smith's obstruction of that investigation came to an end when the officers decided to arrest him. Thereafter, in the course of the arrest, they allegedly engaged in the use of excessive force that rendered the arrest unlawful. It did not, however, render their preceding investigation unlawful, nor would it for *Heck* purposes invalidate a conviction for obstructing that investigation. California law immunizes Smith from prosecution for any conduct that occurred at the time of, or during the course of his unlawful arrest, but it does not immunize him from prosecution for unlawful conduct that occurred prior or subsequent to that time.

There is one remaining complication. As in *Sanford v. Motts,* "nothing in the record informs us what the factual basis for [Smith's] plea" was. 258 F.3d at 1119. There is no indication as to whether Smith's plea was based on his conduct that impeded the officers' investigation before they came onto the porch, or his subsequent resistance to their physical attempt to arrest him, or both. The record is clear that Smith pled guilty to one count of violating § 148(a)(1), but there is no information as to which of his actions constituted the basis for his plea. The charging

complaint simply states that Smith violated § 148(a)(1) when he wilfully and unlawfully resisted, delayed, and obstructed the defendant officers in the discharge of, and attempt to discharge, their duty. Neither party in its briefs or at oral argument was able to identify the facts underlying the plea or to advise us regarding what transpired at the time Smith entered his plea. It is therefore entirely possible that, as Smith asserts, he pled guilty to a violation of § 148(a)(1) on the basis of his actions during the time the officers were conducting their lawful investigation. As the officers acted lawfully in issuing orders to Smith while they were on the ground below where he was standing on his porch, his disobedience of those orders, as we have explained, would not be immunized from prosecution by the officers' subsequent unlawful acts after they decided to arrest him. Because we are unable to determine "the factual basis for [Smith's] plea," *id.*, his lawsuit does *not* necessarily imply the invalidity of his conviction and is therefore not barred by *Heck*. *Heck,* 512 U.S. at 487.

Under similar factual circumstances in *Sanford v. Motts,* we held that because there were "a variety of accusations" against the plaintiff which could have formed the basis of the § 148(a)(1) conviction, and because the challenged conduct was not *necessarily* the predicate for his plea, Sanford's § 1983 suit did not *necessarily* imply the invalidity of the conviction. 258 F.3d at 1119-20. As our dissenting colleagues aptly note, in that case we said that "[e]xcessive force used after an arrest is made does not destroy the lawfulness of the arrest" for a violation of California Penal Code § 148(a)(1). Dissent at 257 (quoting *Sanford,* 258 F.3d at 1120). Although *Sanford* involved an allegation that Officer Motts punched the plaintiff in the face after the plaintiff was arrested, the *Sanford* court did

not limit its explanation of *Heck* to such a case. What the dissent ignores is that in *Sanford,* we clearly held that "Sanford's conviction required that Motts be acting lawfully in the performance of his duties *'at the time* the offense against him was committed.' Hence, if Motts used excessive force subsequent to the time Sanford interfered with his duty, success in her section 1983 claim will not invalidate her conviction. *Heck* is no bar." 258 F.3d at 1120 (citation omitted) (emphasis added). Our holding in *Sanford* was that a § 1983 action is not barred by *Heck* unless the alleged excessive force occurred *at the time* the offense under § 148(a)(1) was being committed. *Id.* Thus, in this case, under *Sanford,* as long as the officers were acting lawfully *at the time* the violation of § 148(a)(1) took place, their alleged acts of excessive force, whether they occurred *before* or *after* Smith committed the acts to which he pled, would not invalidate his conviction.[4]

As we have explained, a § 1983 action is not barred under *Heck* unless it is clear from the record that its successful prosecution would *necessarily* imply or demonstrate that the plaintiff's earlier conviction was invalid. Because on the record before us we cannot determine that the actions that underlay Smith's conviction upon his plea

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[4] Additionally, we note that other circuits have held that *Heck* does not bar § 1983 actions alleging excessive force despite the plaintiff's conviction for resisting arrest. *See, e.g., Robinson v. Doe,* 272 F.3d 921, 923 (7th Cir. 2001) (holding that a finding of excessive force in a § 1983 action would not necessarily imply the invalidity of the plaintiff's conviction for resisting arrest); *Willingham v. Loughnan,* 261 F.3d 1178, 1183 (11th Cir. 2001), *cert. granted and judgment vacated on other grounds,* 537 U.S. 801 (2002) (same); *Martinez v. City of Albuquerque,* 184 F.3d 1123, 1127 (10th Cir. 1999) (same); *Nelson v. Jashurek,* 109 F.3d 142 (3d Cir. 1997) (same); *Wells v. Bonner,* 45 F.3d 90, 95 (5th Cir. 1995) (same).

of guilty occurred at the time of or during the course of his unlawful arrest, Smith's success in the present action would not necessarily impugn his conviction. Accordingly, the defendants are not entitled to summary judgment on the basis of *Heck v. Humphrey.*[5]

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[5] The dissent relies almost exclusively on *Susag v. City of Lake Forest. See* 94 Cal. App. 4th at 1408-10. That case is not controlling for at least three reasons. First, the *Susag* court treated all of the acts involved, including those that immediately preceded the actual arrest, as occurring "at the time of the arrest." In *Susag,* unlike in the present case, there were not two separate phases to the incident, the investigative phase and the arrest itself. Rather, in *Susag* the court considered all of the plaintiff's actions to have occurred in connection with the arrest. For this reason alone, *Susag* is inapplicable here. Second, the discussion in *Susag* upon which the dissent relies is contained in the midst of an analysis of the proper construction to be given *Heck v. Humphrey. Heck* requires the application of federal law to the particular circumstances of the plaintiff's conviction. Insofar as *Susag* purports to construe *Heck,* a federal doctrine, we are in no way controlled by it or required to afford it deference. Moreover, *Susag* misconstrues federal law in that it states, as the dissent emphasizes, that the burden shifted to the civil rights plaintiff to show that a favorable finding "would not necessarily imply the invalidity of the conviction." Federal law is to the contrary. *See Sanford,* 258 F.3d at 1119 (placing the burden on the defendants to prove that plaintiff's success in her § 1983 action would necessarily imply the invalidity of her conviction). Unless it is clear that the plaintiff's action will impugn the underlying conviction the § 1983 action may proceed. It is because of this misapplication of federal law that *Susag* reached the result it did. Accordingly, it does not bind us. Third, under California law, persons who violate § 148(a)(1) in a number of respects in the course of a single incident may be charged and convicted only once. *See People v. Simon,* 21 Cal. App. 88 (Cal. Ct. App. 1913). This rule is for the benefit of defendants and under it a general charge encompasses, and precludes further prosecution of, all the acts involved. Unlike Smith, Susag was convicted after a trial in which the prosecutor established a factual pattern of conduct sufficient for the jury to determine his guilt beyond a reasonable doubt. *Id.* at 1401-07. Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction, a jury does not determine which

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B. The Excessive Force Claim

Smith alleges that after the officers came onto the porch they used both excessive force, generally, and deadly force, specifically, against him in contravention of the Fourth Amendment. Defendants, in contrast, urge that the force used was at all times reasonable and that we may therefore affirm the district court's summary judgment order on this alternative ground. Although we are free to affirm on any alternative basis if the record supports our doing so, we conclude that the record before us does not warrant such a result.

A Fourth Amendment claim of excessive force is analyzed under the framework outlined by the Supreme Court in *Graham v. Connor,* 490 U.S. 386 (1989). All claims that law enforcement officers have used excessive

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specific act or acts form the basis for the conviction. *See People v. McIntyre,* 115 Cal. App. 3d 899, 910-11 (Cal. Ct. App. 1981) ("It is only incumbent that [the jury] agree [a culpable act] occurred on that date, the exact time or sequence in relation to the [offense] is not material.") (citation omitted). Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would "*necessarily* imply the invalidity of his conviction." *Susag,* 94 Cal. App. 4th at 1410 (emphasis added). However, where a § 1983 plaintiff has pled guilty or entered a plea of nolo contendere, such as Smith and Sanford did, it is *not* necessarily the case that the factual basis for his conviction included the whole course of his conduct. In the case of a guilty plea or plea of nolo contendere, as the dissent acknowledges, a defendant is free to admit having committed a specific act or acts of resistance, delay, or obstruction, to identify the particular acts of unlawfulness to which he is willing to plead, and to deny that he engaged in other specific acts. Because Smith pled guilty rather than being convicted by a jury, it is entirely possible that, as he contends, his plea was based on only those actions that served to obstruct the officers' investigation, all of which occurred prior to, rather than at the time of, the arrest. Thus, *Susag* is clearly distinguishable.

force – deadly or otherwise – in the course of an arrest must be analyzed under the Fourth Amendment and its "reasonableness" standard. *See Graham v. Connor,* 490 U.S. at 395; *Ward v. City of San Jose,* 967 F.2d 280, 284 (9th Cir. 1992) (as amended). "It is clear that under *Graham,* excessive force claims arising before or during arrest are to be analyzed exclusively under the [F]ourth [A]mendment's reasonableness standard. . . . " *Reed v. Hoy,* 909 F.2d 324, 329 (9th Cir. 1989), *cert. denied,* 501 U.S. 1250 (1991); *see also Hammer v. Gross,* 932 F.2d 842, 845 (9th Cir. 1991) (en banc). That analysis requires balancing the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the use of force was objectively reasonable under the circumstances. *Graham,* 490 U.S. at 396.

The Supreme Court has said that "the 'reasonableness' inquiry in an excessive force case is an objective one: The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them[.]" *Id.* at 397 (citations omitted); *see, e.g., Jackson v. City of Bremerton,* 268 F.3d 646, 651 (9th Cir. 2001). "The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of *all* the relevant circumstances." *Hammer v. Gross,* 932 F.2d at 846 (emphasis in original).

In *Graham,* the Supreme Court indicated that relevant factors in the Fourth Amendment reasonableness inquiry include "[1] the severity of the crime at issue,[2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by

flight." 490 U.S. at 396. The Court did not, however, limit the inquiry to those factors. "Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," the reasonableness of a seizure must instead be assessed by carefully considering the objective facts and circumstances that confronted the arresting officers. *Id.* In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider. *See Chew v. Gates,* 27 F.3d 1432, 1441 n.5 (9th Cir. 1994).

If the evidence, reviewed in the light most favorable to Smith, could support a finding of excessive force, then the defendants are not entitled to summary judgment. "Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." *Santos v. Gates,* 287 F.3d 846, 853 (9th Cir. 2002); *see also Liston v. County of Riverside,* 120 F.3d 965, 976 n.10 (9th Cir. 1997) (as amended) ("We have held repeatedly that the reasonableness of force used is ordinarily a question of fact for the jury."). This is because such cases almost always turn on a jury's credibility determinations. The case before us is no different.

First, it is necessary to assess the quantum of force used to arrest Smith. "The three factors articulated in *Graham,* and other factors bearing on the reasonableness of a particular application of force, are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure – an analysis the district court never explicitly undertook." *Chew v. Gates,* 27 F.3d at 1441. By even the defendants' account, the force used

against Smith was severe. The Hemet Police Department's use of force policy, General Order U-102, classifies the use of both pepper spray and a police service dog as "intermediate" force. Defendants acknowledge that they employed both types of force, and that "intermediate" force is the most severe force authorized short of deadly force. On Smith's account, the officers' use of force was even greater. As Smith puts it, the officers pepper-sprayed him four times, one of which occurred after they had him pinned down, and sicced Quando on him three times. Under the facts as we must assess them for purposes of this appeal, the officers slammed Smith against the wall, threw him to the ground, slid him off the porch while face down, pepper-sprayed him repeatedly, and either permitted or instructed Quando to attack him on three occasions,[6] at least one such attack occurring while the officers had him pinned to the ground. The canine assault resulted in Quando's teeth puncturing the skin on various parts of Smith's body. As well, Smith stated in his deposition that the effect of the pepper spray was exacerbated because, although the officers flushed out Smith's eyes after he was arrested, they did not flush out the pepper spray in the wounds from the dog bites on his neck, arm, shoulder, back, and buttock.

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[6] There is a question of fact which only a jury can resolve as to whether the police canine initially attacked Smith even prior to Officer Quinn's instruction. In his deposition, Smith stated that the dog began attacking him when he was slammed against the door by Officers Medina, Miller, and Reinbolt. However, defendants claim in their declarations that Quando was ordered to attack only after the officers wrestled Smith to the ground. We leave the ultimate significance of this factual disagreement to the parties to resolve at trial; it is of no consequence for our purposes here. Either way, summary judgment was not proper.

Next, it is necessary to apply the *Graham* criteria, beginning with the "most important single element of the three specified factors: whether the suspect poses an immediate threat to the safety of the officers or others." *Id.* The record does not reveal any basis for believing that Smith was armed or that he posed an immediate threat to anyone's safety. Smith's wife had informed the police that he had no guns or weapons in the house and that he was in his pajamas. Except for the time when he reentered his home, he was in plain view of the officers. Although he initially refused to comply with Officer Reinbolt's instruction to remove his hands from his pajama pockets, he ultimately did so before the officers used any physical force to restrain him. There is no indication in the record that after Smith removed his hands from his pockets there was any reason to believe that he possessed any weapon or posed any immediate threat to the safety of the officers or others. In fact, the defendants concede in their depositions that Smith did not pose a significant threat of death or serious injury. One of the defendant officers, Officer Quinn, stated in his declaration that Smith made no threats, verbal or physical, toward him or anyone else. Although it is true that until both of his arms were handcuffed, Smith continued to shield one arm from the officers and their dog and to shout expletives at the officers, considering the evidence in the light most favorable to him, a rational jury could very well find that he did not, at any time, pose a danger to the officers or others.

The second *Graham* factor we consider is the severity of the crime at issue. *Graham,* 490 U.S. at 396. On the evening of the incident, Smith's wife called 911 to report that her husband "was hitting her and/or was physical with her," that he had grabbed her breast very hard.

Although we are mindful of the seriousness and reprehensibility of domestic abuse, the circumstances are not such in this case as to warrant the conclusion that Smith was a particularly dangerous criminal or that his offense was especially egregious. When Officer Reinbolt arrived, Smith was standing on his porch alone and separated from his wife. He had no guns or other weapons in his possession and there were none in the house – and he was clad in his pajamas. Under these circumstances, the nature of the crime at issue provides little, if any, basis for the officers' use of physical force.

The third *Graham* factor is whether the individual actively resisted arrest or attempted to evade arrest by flight. *Id.* Smith continually ignored the officers' requests to remove his hands from his pajamas and to place them on his head. He also reentered his home for a brief period before returning to the porch. However, Smith did not attempt to run from the officers. To the extent that he physically resisted arrest, defendants acknowledge that it lasted for only a brief time. Although Smith refused to place both his arms behind his back, he did not attack the officers or their dog. In all, it does not appear that Smith's resistance was particularly bellicose or that he showed any signs of fleeing the area.

As we have previously explained, an additional factor that we may consider in our *Graham* analysis is the availability of alternative methods of capturing or subduing a suspect. *Chew v. Gates,* 27 F.3d at 1441 n.5. Smith argues that the officers' conduct violated applicable police standards and that there were alternative techniques available for subduing him that presented a lesser threat of death or serious injury. Smith offered an expert declaration on the training of police dogs and police dog handlers.

Discussing whether the officers' conduct comported with law enforcement standards, the expert relied upon California's Peace Officer Standards and Training, which are applicable to all state police officers and are a part of Department policy. He concluded that the officers could and should have used control holds to complete the arrest rather than to sic Quando on him once they had him restrained on the ground. *See also* Hemet Chief of Police, "Use of Force," Gen. Order No. U-102 (discussing "professional presence," "compliance techniques," and other "intermediate force" less likely to cause death or serious injury). A rational jury could rely upon such evidence in assessing whether the officers' use of force was unreasonable. *See Larez v. City of Los Angeles,* 946 F.2d 630, 635 (9th Cir. 1991) (as amended) (finding that testimony of "an expert on proper police procedures and policies" was relevant and admissible); *Davis v. Mason County,* 927 F.2d 1473, 1484-85 (9th Cir. 1991) (as amended) (testimony of plaintiffs' police practices expert that officers violated law enforcement standards properly received).

Considering the severity and extent of the force used, the three basic *Graham* factors, and the availability of other means of accomplishing the arrest, it is evident that the question whether the force used here was reasonable is a matter that cannot be resolved in favor of the defendants on summary judgment.

Although only Smith's account of the facts matters for our analysis, on both accounts of the arrest, Smith did not attack the officers; indeed at no time did he even threaten to attack any of them, or their dog. Smith asserts that his failure to uncurl his arm from under his body was a reasonable effort to protect himself against an unreasonably excessive use of deadly force in the form of Quando, a

police canine. Even excluding the question of whether the police dog constituted deadly force, a jury well could find that, given the circumstances, the totality of force used – four blasts of pepper spray, slamming Smith down onto the porch, dragging him off the porch face down, ordering the canine to attack him three times, and the resultant dog bites and physical assaults on his body – was unreasonable. We have indeed held on past occasions that the use of lesser force could be unreasonable in the particular circumstances. *See Santos,* 287 F.3d at 853-54 (shoving can amount to excessive force when it is unreasonable); *Headwaters Forest Defense v. County of Humboldt,* 276 F.3d 1125, 1130-31 (9th Cir. 2002) (holding that the use of pepper spray on non-violent protestors was excessive force); *Watkins v. City of Oakland,* 145 F.3d 1087, 1093 (9th Cir. 1998) (holding that deputies' use of a police dog is subject to excessive force analysis); *Mendoza v. Block,* 27 F.3d 1357, 1362 (9th Cir. 1994) (same). In sum, Smith has submitted a substantial amount of evidence from which a reasonable jury could conclude that the force used against him was excessive.[7]

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[7] Defendants suggest an additional ground upon which the order for summary judgment could be affirmed: qualified immunity. Whether the officers are entitled to qualified immunity may depend in large part on factual determinations the jury will be required to make. Certainly, the use of a police canine and pepper spray could, under clearly established law, have constituted the use of excessive force in some circumstances, in which case the officers would have been put on notice that their conduct would be unconstitutional. *See Mendoza v. Block,* 27 F.3d 1357, 1362 (9th Cir. 1994) ("[N]o particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control."); *see also LaLonde v. County of Riverside,* 204 F.3d 947, 961 (9th Cir. 2000) (applying the *Mendoza* rule to the use of pepper spray by police officers). We choose, however, not to

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C. Deadly Force

Smith alleges that the defendants unnecessarily and unreasonably used not only excessive force against him, but also deadly force. He asserts that the latter type of force was used when Officer Quinn ordered the police canine to attack him. In *Tennessee v. Garner,* 471 U.S. 1 (1985), the Supreme Court held that a police officer may not use deadly force "unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3. Thus, where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force. *See, e.g., Billington v. Smith,* 292 F.3d 1177, 1185 (9th Cir. 2002) (holding that deadly force was justified where a suspect violently resisted arrest, physically attacked the officer, and grabbed the officer's gun); *Reynolds v. County of San Diego,* 84 F.3d 1162, 1168 (9th Cir. 1996) (holding that deadly force was reasonable where a suspect, who had been behaving erratically, swung a knife at an officer); *Scott v. Henrich,* 39 F.3d 912, 914-15 (9th Cir. 1994) (suggesting that the use of deadly force is objectively reasonable where a suspect points a gun at officers); *Garcia v. United States,* 826 F.2d 806, 812 (9th Cir. 1987) (holding that deadly force was reasonable where the plaintiff attacked a border patrol agent with a rock and stick).

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resolve the issue of qualified immunity on this appeal, preferring to allow the district court to consider that question initially.

The issue presented by Smith is initially whether the use of Quando to subdue him amounted to an unreasonable use of deadly force; however, as no party to this case asserts that the use of deadly force would have been appropriate here, the issue is actually only whether the use of Quando constituted deadly force. As we are reviewing an order of summary judgment, all that we must decide is whether the use of Quando to subdue Smith *could* have amounted to deadly force under the facts of this case.

Unfortunately, the Supreme Court did not explicitly define what constitutes deadly force in *Garner,* and the definition that we have previously announced is incorrect. In *Vera Cruz v. City of Escondido,* 139 F.3d 659, 663 (9th Cir. 1998) (as amended), this court considered the meaning of the term. In that case, we held that deadly force means "force reasonably likely to kill." *Id.* at 660. In doing so, we expressly refused to add "or result in serious bodily injury," a phrase that appears in the definition employed by all other circuits that have defined the term. *Id.* at 661-62. Similarly, we deliberately chose "reasonably likely" rather than "creates a substantial risk," the phrase employed by all other courts of appeals to have confronted the question. *Id.* at 662-63. The definition the other circuits have adopted and that we adopt today is identical in most respects to that set forth in the Model Penal Code. *See* Model Penal Code § 3.11(2) (1962).

In *Vera Cruz,* we reviewed the Model Penal Code definition of deadly force and rejected it for three reasons. 139 F.3d at 662. First, we stated that the Model Penal Code definition, which governs criminal liability, serves a different purpose than the *Garner* standard which sets the boundaries of reasonable police conduct under the Constitution. *Id.* We

were concerned that imposing personal liability on the basis of the Model Penal Code definition would "make police timid and deter activities necessary for our protection." *Id.* Second, we said that the Model Penal Code definition includes a subjective component, and that such a component constitutes "an impermissible consideration in the Fourth Amendment context," the scope of which is limited to the objective reasonableness test adopted in *Graham*. *Id.* Third, we feared that the "disjunctive 'or' would turn the deadly force rule into a 'serious bodily injury' rule, rendering *Garner's* distinction between ordinary force and deadly force a virtual nullity." *Id.*

Smith asks us to reconsider our *Vera Cruz* ruling, and points out that seven circuits now employ the definition of "deadly force" that we rejected. Indeed, we stand alone in adopting a definition of the term that upon reconsideration we find to be unduly restrictive. *See, e.g., Gutierrez v. City of San Antonio,* 139 F.3d 441, 446 (5th Cir. 1998) (deadly force "creates a substantial risk of death or serious bodily injury"); *Estate of Phillips v. City of Milwaukee,* 123 F.3d 586, 593 (7th Cir. 1997) (same); *In re City of Philadelphia Litigation,* 49 F.3d 945, 966 (3rd Cir. 1995) (adopting the Model Penal Code definition); *Ryder v. City of Topeka,* 814 F.2d 1412, 1416 n.11 (10th Cir. 1987) (same); *Robinette v. Barnes,* 854 F.2d 909, 912 (6th Cir. 1988) (same); *Pruitt v. City of Montgomery,* 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (same); *Mattis v. Schnarr,* 547 F.2d 1007, 1009 n.2 (8th Cir. 1976) (en banc), *vacated as moot sub nom., Ashcroft v. Mattis,* 431 U.S. 171 (1977) (same). We recognize the importance of consistency across jurisdictions, and we take this opportunity to bring our circuit into conformity with the other circuits and to adopt a definition

that is more compatible with the practicalities and realities of today's physical confrontations.[8]

In *Vera Cruz,* we were concerned that the definition we rejected would "make police timid and deter activities necessary for our protection" and "would turn the deadly force rule into a 'serious bodily injury' rule, rendering *Garner's* distinction between ordinary force and deadly force a virtual nullity." 139 F.3d at 662. However, our concerns have turned out to be overstated, and indeed unfounded. A definition including "a substantial risk of serious bodily injury" is used by police in all fifty states, the District of Columbia, and Puerto Rico, and such use has not resulted in the difficulties we feared. Equally important for this case, it is the definition that California and the Hemet Police Department use. Adopting the common definition of deadly force should impose no more of a burden on law enforcement officials than already exists throughout the nation – a burden that most law enforcement officials have voluntarily chosen to impose upon themselves. *See Garner,* 471 U.S. at 18-20 (discussing the importance of actual police department polices when adopting a Fourth Amendment rule).

The *Vera Cruz* court also criticized the Model Penal Code definition because it contained an alternative subjective component in addition to the primary objective one. Like the *Vera Cruz* court, we attribute the inclusion of an

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[8] In a footnote, the Eighth Circuit noted the conflict between *Vera Cruz* and the law in other circuits and indicated its approval of the *Vera Cruz* approach. *See Kuha v. City of Minnetonka,* 365 F.3d 590, 598 n.3 (8th Cir. 2004). Nevertheless, it applied the Model Penal Code definition, undoubtedly because that is the definition the court adopted in its en banc opinion in *Mattis,* 547 F.2d at 1009 n.2.

alternative subjective component in the Model Penal Code definition to the fact that the Model Penal Code is primarily designed to govern criminal liability. However, the definition of deadly force used in the other circuits in § 1983 cases, while frequently labeled the Model Penal Code definition, is designed for use in implementing the Fourth Amendment and necessarily differs in one minor respect from the Model Penal Code's definition. For Fourth Amendment purposes, the objective part of the test must be employed. *See Graham,* 490 U.S. at 397. In short, courts do not use the subjective alternative when they apply the "deadly force" test in § 1983 cases. We simply look to the objective part of the test: whether the force employed "creates a substantial risk of causing death or serious bodily injury." That the definition courts describe varies to this extent from the full Model Penal Code version is no reason for us not to employ a test that is now universally accepted throughout the country.

Furthermore, the fact that we are applying a definition of deadly force to defendant police officers that is similar to the definition we use when evaluating the force used by criminal defendants need not concern us. The Supreme Court and our own court have often referred to the Model Penal Code as persuasive authority in interpreting the Constitution. *See, e.g., United States v. U.S. Gypsum Co.,* 438 U.S. 422, 444 (1978) (relying on a Model Penal Code definition, the Court stated, "[t]he ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of this type"). Both the police we honor and the criminals we prosecute are subject to the same binding Constitution. We refuse to fabricate a constitutional distinction between police and civilians that, far from being based on any constitutional

explanation, has been overwhelmingly rejected by judges and law enforcement officials nationwide. We erred in *Vera Cruz* when we rejected the definition that finds its origin in the Model Penal Code, and we now take this opportunity to overrule that holding and adopt the definition of deadly force used by the other circuit courts throughout the nation.

We need not here determine whether the use of a police dog to subdue a suspect constitutes deadly force generally or the circumstances under which such use might constitute such force. Having announced the definition of "deadly force" we leave to the district court the first opportunity to apply the concept to the facts of this case. We note only that while we have not in any of our prior cases found that the use of police dogs constituted deadly force,[9] we have never stated that the use of such dogs cannot constitute such force. *Cf. Robinette v. Barnes,* 854 F.2d 909, 913 (6th Cir. 1988) (although failing to find that the police dog in that case constituted deadly force, the court stated that "an officer's intent in using a police dog, or the use of an improperly trained dog, could transform the use of the dog into deadly force"). *Compare Kuha,* 365 F.3d at 598 n.3 ("[T]he use of a properly trained police dog in the course of apprehending a suspect does not constitute deadly force").

III. CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment. On the record before

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[9] Of course, we have heretofore applied the unduly stringent *Vera Cruz* test which we overrule today.

us, we cannot conclude that Smith's § 1983 action is barred by *Heck;* his successful prosecution of this action will not necessarily impugn his earlier conviction. Further, considering the evidence in the light most favorable to Smith, a reasonable jury could find that the defendants used excessive force. Finally, we overrule *Vera Cruz* and adopt the universally accepted definition of the term deadly force; we do not, however, decide whether the officers used such force here, but leave that question for initial consideration following remand. The grant of defendants' motion for summary judgment is **REVERSED AND REMANDED**.

SILVERMAN, Circuit Judge, with whom KLEINFELD and CALLAHAN, Circuit Judges, join, dissenting:

By analyzing separately every single second of the approximately five-minute encounter between Smith and the Hemet police, the majority misses the forest for the trees. Here's the forest: From the moment the police arrived and told Smith to remove his hands from his pockets, until the police finally handcuffed him, the police were trying to subdue and detain Smith, and he resisted. The undisputed facts show that this was one continuous, uninterrupted sequence of events. The majority gets off the track by focusing on how many different ways Smith might have violated the law after the police arrived at the scene. It does not matter. What matters is that Smith's actions, however numerous, culminated in one arrest. He was then convicted, by guilty plea, of resisting an officer. In California, a conviction for resisting arrest establishes that the force used to effect the arrest was not excessive. *People v. White,* 101 Cal. App. 3d 161, 164 (1980). That is why Smith's § 1983 excessive force lawsuit is barred by *Heck.* If his lawsuit were successful, the civil judgment in

his favor would be inconsistent with his criminal conviction.

The contrast between this case and *Sanford v. Motts*, 258 F.3d 1117 (9th Cir. 2001), illustrates the point. In *Sanford*, the plaintiff had already been arrested and handcuffed when she was allegedly punched in the face by Officer Motts. *Id.* at 1118. We held: "Excessive force used *after an arrest is made* does not destroy the lawfulness of the arrest" for a violation of California Penal Code § 148. *Id.* at 1120 (emphasis added). Because a successful § 1983 claim for events that took place *subsequent to* her arrest could in no way imply the invalidity of her § 148 conviction, Sanford's conviction for violating § 148 did not trigger the *Heck v. Humphrey* bar to her § 1983 lawsuit.

This is in sharp contrast to the present case where the allegedly excessive force was employed *while* Smith was being arrested. It does not matter how many times Smith refused to take his hands out of his pockets or to step off the porch. It does not matter how many times he refused to turn around or how many times he may have flailed his arms as the police tried to handcuff him. The undisputed facts show that "there was no break," to use the words of the *Cunningham* court, between Smith's disobedience and the police response that culminated in his arrest. *See Cunningham v. Gates*, 312 F.3d 1148, 1155 (9th Cir. 2002). Smith's "provocative act" and "the police response he claims was excessive ... are so closely interrelated, [Smith's] conviction forecloses his excessive force claim." *Id.*

This is an issue of California law, and in a case with facts very close to Smith's, the California Court of Appeal concluded that *Heck* barred a § 1983 suit where the

plaintiff had been convicted of a § 148 violation involving multiple acts of resistance. *Susag v. City of Lake Forest,* 94 Cal. App. 4th 1401, 1405-06 (2002). In *Susag,* a deputy sheriff noticed a car with an expired registration and called for a tow truck. *Id.* at 1406. Although Susag initially denied owning the car, after it was hitched to the tow truck he got into the driver's seat. He was ordered out of the car "several times" but refused to get out – one act of resistance. He started the car and accelerated the engine – another act of resistance. The deputy then pepper-sprayed Susag and again ordered him to get out of the car, which Susag refused – another act of resistance. Susag then pushed one of the deputies – yet another act of resistance – and struggled with the deputies when they tried to handcuff him – a final act of resistance. A jury found him guilty of one count of violating § 148. Susag and his family subsequently brought a § 1983 suit alleging excessive force and other claims against the officers involved. *Id.* at 1407. The trial court granted summary judgment to the officers on the grounds that Susag's suit was barred by *Heck. Id.*

The California Court of Appeal affirmed. In doing so, the court rejected Susag's argument that the *Heck* bar did not apply when it was unclear which act of acts of resistance formed the basis of the Susag's § 148 conviction.

> [Susag] contends the record in his criminal case, which is not before us, does not reflect which acts formed the basis for his conviction, and as a result he can pursue his section 1983 action for the officer's use of pepper spray before he was ultimately subdued and placed in the patrol car. We disagree and conclude that any claim of excessive force based on discrete acts that occurred immediately preceding [Susag's] arrest is barred by the Supreme Court's holding in *Heck v.*

> *Humphrey,* [citation omitted], since a finding in his favor would necessarily imply the invalidity of his conviction under Penal Code section 148, subdivision (a).

Id. at 1409-10. In addition, the Court of Appeal contrasted Susag's situation to the one presented in *Sanford,* noting that, "[Susag] has alleged no claims of excessive force that took place *after* he was finally subdued and placed in the patrol car." *Id.* at 1410. (emphasis added.)

The majority argues that Smith's conviction might have been based only on his conduct while on the porch, before any force was used; ergo, the conviction fails to establish the lawfulness of the force employed from that point on. This argument is foreclosed by *Susag.* In addition, under California's continuous course of conduct rule, Smith's conviction for resisting arrest necessarily includes all of the acts that comprise a continuous or indivisible transaction. *People v. McFarland,* 58 Cal. 2d 748, 760 (1962); *People v. Simon,* 21 Cal. App. 88, 90 (1913). The major considerations in determining whether similar acts are part of the same transaction are the amount of time elapsed between the discrete incidents, and whether there was any break in the criminal activity. *See People v. Jefferson,* 123 Cal. App. 2d 219, 221 (1954) (holding that two distinct acts of assault with a deadly weapon taking place within a fifteen minute period "were a part of the same incident, and they could not reasonably be held to constitute two separate offenses, each complete in itself, and each of which would require a separate charge"); *People v. Mota,* 115 Cal. App. 3d 227, 233 (1981). Had discrete acts of resistance taken place over the course of an hour rather than five minutes, they might not have constituted the same offense. *See People v. Moreno,* 32 Cal.

App. 3d Supp. 1, 8-9 (1973) (holding two instances of violating § 148 *were* two offenses because thirty minutes elapsed between the two incidents and "[i]n the intervening space of time the defendant had completely calmed down, and ceased his criminal activity"). Here, however, it is undisputed that Smith's encounter with the Hemet police took place during one continuous, uninterrupted five-minute period.[1]

The continuous course of conduct rule is for the protection of criminal defendants like Smith. The rule bars the state from prosecuting a defendant again for acts that were part and parcel of the same continuous transaction. It is this rule that now prevents the State of California from charging Smith anew for the conduct occurring after he first refused to take his hands out of his pockets. And again for refusing to put his hands on his head. And again for not turning around. And again for not coming off the porch. And again for refusing to submit to handcuffing. Smith was charged and convicted of one count of resisting an officer that necessarily encompassed the entire sequence of events leading up to his arrest. If, for whatever reason, Smith wanted to waive the protection of that rule and plead guilty to one identified act, leaving himself open to possible prosecution for acts that otherwise would be dead letters, it was incumbent upon him to say so. *See*

[1] The majority says that the encounter lasted "substantially longer than five minutes." I guess that depends on what "substantially longer" means. According to Smith's brief, Officer Reinbolt, the first officer to respond, started the tape recorder when he arrived at the scene. The transcript of the recording shows that the tape was turned off after Smith had been handcuffed and was having his eyes washed out with water from a garden hose. From start to finish, the recording lasted five minutes and thirteen seconds.

Susag, supra, at 1410 ("Once the defendants met their burden of proving [Susag] had an undisturbed conviction under Penal Code section 148, subdivision (a), the burden shifted to him to provide evidence of excessive force that would not necessarily imply the invalidity of his conviction.").

The majority's citation of cases from other circuits reveals its misunderstanding of how state criminal law affects the *Heck* analysis. The question in *this* case is what a *California* resisting arrest conviction establishes. The citation to *Robinson v. Doe,* 272 F.3d 921 (7th Cir. 2001), and other federal cases arising from other states, where the criminal law is different, sheds no light on the matter. In Illinois, for example, excessive force does *not* render an arrest illegal. *Id.* at 923. ("Police might well use excessive force in effecting a perfectly lawful arrest."). As we have seen, the law is otherwise in California.[2]

To summarize: If Smith had been gratuitously sprayed with mace or bitten by the dog *after* he had been arrested, his conviction for resisting an officer would not have barred his § 1983 lawsuit. However, everything Smith complains of took place *in the course of* arresting him. The district court correctly ruled that Smith's excessive force

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[2] It is also the rule in California that multiple acts of resistance culminating in an arrest for resisting an officer are subsumed in one California Penal Code § 148 conviction. *Susag,* 94 Cal. App. 4th at 1409-10. The majority may dislike that rule, but is not free to substitute its own view of California state law for that of the California Court of Appeal. *See Mendez v. Small,* 298 F.3d 1154, 1158 (9th Cir. 2002).

lawsuit was barred by *Heck v. Humphrey,* and for that reason, I respectfully dissent.[3]

[3] Because the lawsuit is *Heck*-barred, it is unnecessary to reach, as the majority does, the question of whether the force used to arrest Smith was excessive or whether the use of the dog constituted deadly force. However, in the interest of the completeness of the story, it should be noted that prior to this incident, Quando's teeth had been capped and were incapable of inflicting deep puncture wounds. The bite wounds sustained by Smith were superficial and were cleaned at the scene by paramedics. Smith was taken to a hospital immediately after his arrest, before being booked into jail. He was evaluated at the hospital but required no further treatment of any sort.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS SMITH,

Plaintiff-Appellant,

v.

CITY OF HEMET, a municipal corporation; HEMET POLICE DEPARTMENT; LEE EVANSON; DAVE QUINN; AARON MEDINA; REINBOLT; TRAINER; NATE MILLER; PETER HEWITT,

Defendants-Appellees.

No. 02-56445

D.C. No.
CV-00-00811-VAP

OPINION

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted
July 8, 2003 – Pasadena, California

Filed January 29, 2004

Before: Barry G. Silverman, William A. Fletcher, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Rawlinson;
Dissent by Judge W. Fletcher

COUNSEL

Donald W. Cook, Esq. and Robert Mann, Esq., Los Angeles, California, for the plaintiff-appellant.

Julie H. Biggs, City Attorney, Hemet, California; Elizabeth H. Feffer, Esq., Burke, Williams & Sorensen, LLP, Los Angeles, California, for the defendants-appellees.

OPINION

RAWLINSON, Circuit Judge:

In this case, we once again address the quagmire created by the interplay between *Heck v. Humphrey*, 512 U.S. 477 (1994) and convictions for violations of California Penal Code § 148. Because the California courts have interpreted § 148 in such a manner as to incorporate a finding of no excessive force, we AFFIRM the district court's ruling that *Heck* bars Thomas Smith's § 1983 action.

I. FACTS/PROCEDURAL HISTORY

This saga began when Smith's wife, Cynthia, placed an emergency phone call to the Hemet Police Department ("Department") reporting that her husband "was hitting her and/or was physical with her."

Officer Reinbolt was the first officer to arrive in response to the call. Upon his approach, Officer Reinbolt observed Smith standing on his front porch. Officer Reinbolt directed his flashlight towards Smith "and noticed Smith's hands in his pockets."[1] Officer Reinbolt announced himself and instructed Smith to remove his hands from his pockets. Smith refused, responding with expletives and

[1] Smith's wife informed the 911 operator that her husband was unarmed and that there were no weapons in the house. She also told the 911 operator that Smith was clad in pajamas.

directing Officer Reinbolt to approach. Officer Reinbolt informed Smith that he would approach, but only after Smith removed his hands from his pockets to demonstrate he had no weapons. Smith again refused to remove his hands from his pockets and instead entered his home.

After Officer Reinbolt advised dispatch that Smith refused to remove his hands from his pockets and had just reentered his home, Smith reemerged onto the porch with his hands still in his pockets. Officer Reinbolt again requested that Smith show his hands. Smith eventually complied with this instruction, but repeatedly refused to comply with Officer Reinbolt's instruction to "put his hands on his head and walk towards [the officer's] voice[.]" Instead, Smith again directed Officer Reinbolt to approach and enter the home with him.

Officer Nate Miller arrived in response to Officer Reinbolt's radioed request for assistance. Observing Smith's refusal to cooperate with Officer Reinbolt, Officer Miller contacted dispatch to request additional assistance. Officer David Quinn, a canine handler with the Department, arrived shortly thereafter with "Quando," a police canine. Officer Aaron Medina also responded to assist Officer Reinbolt.

Officer Quinn instructed Smith to turn around and place his hands on his head. Smith refused, despite being informed that Quando might be sent to subdue him and might bite. Without warning, Officer Quinn sprayed Smith in the face with pepper spray. Smith responded with expletives and attempted to reenter his residence. Several officers then grabbed Smith from behind, slammed him against the door, and threw him to the ground. Quando bit Smith on his right shoulder and neck area.

Although Smith agreed to comply while Quando was biting him, he admitted that he was "curled up," in an attempt to shield himself from the dog and that one of his hands was "tucked in somewhere," still out of the officer's view. As an officer attempted to secure both arms, Quando bit Smith a second time, this time on his left shoulder blade. Quando retreated, and the officers dragged Mr. Smith off the porch, face down. Once off the porch, Smith continued to hide his arms under his body; Quando bit Smith a third time, on the buttock.

Eventually, Smith complied with the officers' efforts to place him in handcuffs. Officer Reinbolt washed Smith's eyes out with water from a nearby hose. Paramedics arrived shortly thereafter and attended to Smith, who required no serious medical treatment.

The Riverside County District Attorney's Office filed charges against Smith for spousal battery in violation of Cal. Penal Code § 243(e) and for "resist[ing], delay[ing] and obstruct[ing]" an officer in the performance of his duties in violation of Cal. Penal Code § 148. Smith pled guilty to both counts.

Smith subsequently filed a federal Complaint under 42 U.S.C. § 1983 alleging that the officers used excessive force. Appellees moved for summary judgment, which the district court granted on the basis of *Heck v. Humphrey.* Judgment was entered, and Smith filed a timely Notice of Appeal.

II. STANDARDS OF REVIEW

We review the district court's grant of summary judgment *de novo. See Cunningham v. Gates,* 312 F.3d

1148, 1153 (9th Cir. 2002). "Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law." *Jackson v. City of Bremerton,* 268 F.3d 646, 650 (9th Cir. 2001) (citation omitted).

III. ANALYSIS

Smith's conviction for resisting arrest bars his excessive force claim.

In *Heck v. Humphrey,* the United States Supreme Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. . . . A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed . . .

512 U.S. at 486-487.[2]

Under Cal. Penal Code § 148, "[e]very person who willfully resists, delays, or obstructs any public officer [or] peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment" is punished as a misdemeanor offender. Cal. Penal Code § 148(a)(1). "The legal elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." *In re Muhammed C.*, 95 Cal.App.4th 1325, 1329 (2002) (citations omitted).

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[2] The dissent, citing *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002), argues that we are required to allow Smith to proceed because he was no longer in custody when we heard his appeal and, thus, was unable to file a petition for habeas corpus under 28 U.S.C. § 2254. When we allowed Nonnette to proceed, however, we recognized that "[t]he district court . . . committed no error in deciding as it did . . . because habeas corpus would have been available to test the validity of the disciplinary proceeding" when it entered its decision. *Id.* at 877. We made an exception for Nonnette, who was challenging a prison disciplinary proceeding, because "we have statutory authority to provide such relief 'as may be just under the circumstances,'" *id.* at 878 (quoting 28 U.S.C. § 2106) and, in that "instance, we conclude[d] that justice require[d] that we . . . permit Nonnette to proceed with his § 1983 claims . . . *Id.* If asked to make such an exception here (something Smith has *not* done), we would look at the opportunity Smith had to file a habeas petition. While Nonnette had just under a year, Smith had three years – of which three months remained when the district court entered its decision dismissing the case on *Heck* grounds. Yet, he inexplicably failed to seek habeas relief. We, therefore, would *not* make an exception in his case because to permit Smith to sit out his right to file a petition for writ of habeas corpus so that he can attack his conviction by way of a § 1983 lawsuit is exactly what *Heck* seeks to avoid.

Smith contends that the force the officers used to effect his arrest was excessive. However, the California Court of Appeal's construction of Cal. Penal Code § 148 makes it clear that a successful excessive force claim would necessarily render a § 148 conviction invalid. *See Susag v. City of Lake Forest,* 94 Cal.App.4th 1401, 1405-1406 (2002). In explaining its ruling, the Court of Appeal observed that:

> In California, the lawfulness of an arrest is an essential element of the offense of resisting or obstructing a peace officer. If the officer was not performing his or her duties at the time of the arrest, the arrest is unlawful and the arrestee cannot be convicted under Penal Code section 148, subdivision (a). *"[E]xcessive force by a police officer . . . is not within the performance of the officer's duty."*

Id. at 1409 (citations omitted) (emphasis added) (alteration in the original).

We are bound by decisions of the California Supreme Court interpreting a California statute. *See Vestar Dev. II, LLC v. Gen. Dynamics Corp.,* 249 F.3d 958, 960 (9th Cir. 2001) ("When interpreting state law, federal courts are bound by decisions of the state's highest court.") (citation omitted). Should no Supreme Court authority exist, and "[i]n the absence of convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate courts." *Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486, 1494 n.4 (9th Cir. 1996) (citation and internal quotation marks omitted).

The California Supreme Court has not directly interpreted California Penal Code § 148 as incorporating the

lawful use of force. However, it does not appear that the California Supreme Court would decide the issue any differently than the California Court of Appeal. To the contrary, the California Supreme Court has implicitly accepted the interpretation adopted by the California Court of Appeal. "Section 148 has long been construed by the courts as applying only to lawful arrests . . ." *People v. Curtis,* 70 Cal. 2d 347, 354 (1969), *disapproved on other grounds in People v. Gonzalez,* 51 Cal. 3d 1179, 1222 (1990). "[I]f the arrest is ultimately determined factually to be unlawful, the defendant can be validly convicted only of simple assault or battery." *Id.* at 355-56.

California law leaves us no choice but to regard a § 148 conviction as incompatible with an allegation that the arrest was unlawful. "[W]here excessive force is used in making what otherwise is a technically lawful arrest, the arrest becomes unlawful . . . " *People v. White,* 101 Cal. App. 3d 161, 164 (1980).[3] Thus, an allegation that excessive force was used in *making* an arrest is incompatible

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[3] This aspect of California law distinguishes the case at bar from those regarded by the dissent as conflicting with our opinion. In *Nelson v. Jashurek,* 109 F.3d 142 (3rd Cir. 1997), Nelson was allowed to proceed on a § 1983 claim, despite having an outstanding conviction for resisting Jashureck's arrest, because in Pennsylvannia "a finding that Jashureck used excessive 'substantial force' would not imply that the arrest was unlawful . . . " *Nelson,* 109 F.3d at 145 (internal quotation marks in original). Similarly, in *Martinez v. City of Albuquerque,* 184 F.3d 1123 (10th Cir. 1999), Martinez was allowed to proceed with a § 1983 claim "to the extent . . . [it] d[id] not challenge the *lawfulness* of his arrest . . . [under New Mexico law]." *Martinez,* 184 F.3d at 1125 (emphasis in original). Finally, in *Robinson v. Doe,* 272 F.3d 921 (7th Cir. 2001), a § 1983 action asserting that Robinson was arrested with excessive force was not barred by *Heck* because, under Illinois law, "[p]olice might well use excessive force in effecting a perfectly lawful arrest." *Robinson,* 272 F.3d at 923.

with . . . a § 148 conviction. *See* California Jury Instructions, Criminal ("CALJIC") No. 16.110, 16.111.[4]

For Smith to proceed on his excessive force claim, he must allege facts that would support a finding that the police used excessive force after his arrest was effected. However, as the district court noted, "even under Plaintiff's

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[4] CALJIC 16.110. Performing or Discharging Duties of Officer – Burden of Proof

In a prosecution for violation of [___], the People have the burden of proving beyond a reasonable doubt that the peace officer was [engaged in the performance of [his] [her] duties] [or] [discharging or attempting to discharge a duty of [his] [her] office].

A peace officer is not [engaged in the performance of [his] [her] duties] [or] [discharging or attempting to discharge a duty of [his] [her] office] if [he] [she] [makes or attempts to make an unlawful [arrest] [detention]] [or] [uses unreasonable or excessive force in making or attempting to make the [arrest] [detention]].

(emphasis added).

CALJIC 16.111. Use of Excessive Force by Officer

A peace officer is not permitted to use unreasonable or excessive force [in making or attempting to make an otherwise lawful arrest] [in detaining or attempting to detain a person for questioning].

If an officer does use unreasonable or excessive force [in making or attempting to make an arrest] [in detaining or attempting to detain a person for questioning], the person being [arrested] [detained] may lawfully use reasonable force to protect [himself] [herself].

Thus, if you find that the officer used unreasonable or excessive force [in making or attempting to make the arrest] [in making or attempting to make the detention] in question, and that the defendant used only reasonable force to protect [himself] [herself], the defendant is not guilty of the crime charged [in Count[s]___] [or of any lesser included offense].

version of the events, the Defendants sprayed him in the face with pepper spray and had the dog bite him *while* arresting him." Order at 8 (emphasis in the original). Thus, we find that Smith's § 148 conviction bars him proceeding with his particular § 1983 claim.

Smith relies on *Sanford v. Motts,* 258 F.3d 1117 (9th Cir. 2001) to support his position. It is true that in *Sanford* we allowed a § 1983 claim for excessive force to proceed despite the fact that the plaintiff was convicted under Cal. Penal Code § 148(a)(1). However, in *Sanford,* we emphasized that the excessive force occurred after the arrest was completed. *See* 258 F.3d at 1120. In this case, the alleged excessive force occurred contemporaneously with the arrest, and directly implicated *Heck's* holding.

We have recently observed that "[u]nder *Heck* . . . 'if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed.'" *Cunningham,* 312 F.3d at 1153 (citation omitted). In *Cunningham,* we concluded that *Heck* barred the plaintiff's § 1983 claim because "there was no break between [the plaintiff's] provocative act . . . and the police response that he claim[ed] was excessive." *Id.* at 1155. We distinguished *Smithart v. Towery,* 79 F.3d 951 (9th Cir. 1996), which allowed a § 1983 excessive force claim to proceed despite the fact that the plaintiff in the § 1983 action was convicted of assaulting the arresting officers. *See id.* at 952. In *Cunningham,* we specifically observed that the "factual setting" in *Smithart* was different from that in which Cunningham was involved:

> The plaintiff in *Smithart* tried to use his truck to run over the sheriff and state patrolman, an act for which he was later convicted of assault. The plaintiff claimed that, after he got out of his truck, the sheriff and patrolman used excessive force to arrest him. The assault conviction and the excessive force claim did not arise from the same acts. Indeed, once he was out of the truck and without access to his "assault weapon," the officers had no need to use excessive force to subdue the plaintiff or to protect themselves. Here, however, there was no break between Cunningham's provocative act of firing on the police and the police response that he claims was excessive.

Cunningham, 312 F.3d at 1155 (citations omitted).

The facts in this case differ similarly from those in *Smithart.* Here, the § 148 conviction *does* arise from the same acts as those which precipitated the use of force by the officers. "Because the two are so closely interrelated, [Smith's] conviction forecloses his excessive force claim against the . . . officers." *Id.*

Smith contends that "because the officers' commands that were disobeyed *preceded* the uses of force, a finding that the officers' *response* to Mr. Smith's disobedience was excessive does not invalidate the lawfulness of the officers' commands." We are not persuaded. As in *Cunningham,* Smith's actions immediately preceded and precipitated what Smith alleges to be "excessive force," force which was used only because Smith resisted the officers' efforts to subdue and arrest him. *See Cunningham,* 312 F.3d at 1155. "Indeed, . . . the police response was a natural consequence" of Smith's defiant acts. *Id.* In contrast, *Sanford* involved two discrete incidents. The first skirmish was between Sanford and the animal control officer, for

which she was placed under arrest. The second altercation was between Sanford and a police officer, who punched her in the face while she was handcuffed. We ruled that Sanford's § 1983 action against the officer in no way challenged the validity of her conviction because the act of which she was convicted was not identified as her resistance to the officer's punch. *Sanford,* 258 F.3d at 1118-1119. In contrast, the force in this case was specifically linked to Smith's resistance. As was the case in *Cunningham,* Smith's resistance and the officers' restraint were "part of a single act . . . " 312 F.3d at 1154. In such circumstances, *Heck v. Humphrey* bars relief. *See id.* at 1155.

Sanford, by limiting the California rule that invalidates arrests made with excessive force, ultimately stands for the unremarkable premise that "[e]xcessive force used after an arrest is made does not destroy the lawfulness of the arrest." *Sanford,* 258 F.3d at 1120. *Sanford* does not countenance the astounding notion that any force subsequent to the commission of an act violating § 148 may serve as the basis for a § 1983 action, even if the arrest is not yet complete.

IV. CONCLUSION

We conclude that because of the California state courts' interpretation of Cal. Penal Code § 148 and the facts of this case, a judgment in favor of Smith would necessarily imply the invalidity of his conviction. Accordingly, his action under 42 U.S.C. § 1983 is barred by *Heck v. Humphrey,* and the district court's grant of summary judgment in favor of Defendants/Appellees is

AFFIRMED.

W. FLETCHER, Circuit Judge, dissenting:

Plaintiff Thomas Smith pled guilty to a violation of California Penal Code § 148(a)(1) and was sentenced to three years' probation. Section 148(a)(1) makes it a misdemeanor for a person to "willfully resist, delay, or obstruct any . . . peace officer . . . in the discharge" of his or her duties. Cal. Penal Code § 148(a)(1). Smith filed this § 1983 suit alleging excessive force by the police during the events leading up to his arrest. Smith filed suit while he was still on probation and was therefore "in custody" for purposes of habeas corpus. However, when we heard argument in this case he was no longer in custody, and habeas corpus was no longer available as a remedy.

The majority holds that Smith's § 1983 suit is barred by the Supreme Court's decision in *Heck v. Humphrey,* 512 U.S. 477 (1994). For two independently sufficient reasons, the majority is wrong as a matter of law.

First, in *Heck* the Court held that a prisoner plaintiff cannot bring a § 1983 suit if success in that suit "would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. In that event, the plaintiff's sole remedy is habeas corpus. If, on the other hand, "the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the [§ 1983] action should be allowed to proceed[.]" *Id.* (emphasis in original). In this case, success in Smith's § 1983 suit would not "necessarily imply" or "demonstrate" the "invalidity of his conviction or sentence" under § 148(a)(1). His suit therefore "should be allowed to proceed." In holding Smith's § 1983 suit barred by *Heck,* the majority's decision directly conflicts with *Heck* itself, with our own decision in *Sanford v. Motts*, 258 F.3d 1117

(9th Cir. 2001), and with the decisions of four of our sister circuits.

Second, in *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002), we held that a § 1983 suit is available to a plaintiff who, when his appeal is heard, cannot file a habeas petition because he has been released from custody. In holding that Smith's suit is barred despite the current unavailability of habeas, the majority's decision conflicts with *Nonnette*.

The majority is also wrong as a matter of policy. The decision provides a road map that will enable police effectively to eliminate many, perhaps most, § 1983 excessive force suits. Under the majority's decision, if a police department is concerned that one or more of its officers may have used excessive force, it should press charges under Cal. Penal Code § 148(a)(1) or an equivalent statute. In most cases, it will be easy to show that at some point in the encounter the would-be § 1983 plaintiff "resist[ed], delay[ed], or obstruct[ed]" a police officer in the discharge of his or her duties. If the would-be plaintiff pleads guilty to a violation of § 148(a)(1) or its equivalent in return for a probated sentence, as Smith did in this case, a § 1983 suit based on excessive force is forever barred. This is a pretty neat trick, made possible – indeed invited – by the majority's decision.

I. Background

The facts of the encounter between Smith and the police are not seriously disputed. Smith's wife called the police to report a domestic disturbance. When the police arrived, Smith came out onto the porch of his house with his hands in his pockets. Officer Reinbolt, the first officer

on the scene, instructed Smith to remove his hands from his pockets. Smith refused to comply. Instead, he swore at Officer Reinbolt, entered the house, and reemerged with his hands still in his pockets. Officer Reinbolt then instructed Smith to put his hands on his head and come down from the porch. Smith again refused to comply. Officer Quinn then instructed Smith to turn around and place his hands on his head. Smith again refused to comply.

After these refusals, the officers came onto the porch. They pepper-sprayed Smith, pushed him against the door, wrestled him to the ground, and instructed a police canine to bite him. Based on a tape recording made by Officer Reinbolt, we know that the entire encounter lasted five minutes or somewhat longer.

Smith pled guilty in California Superior Court to a violation of California Penal Code § 148(a)(1).[1] Section 148(a)(1) provides: "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, . . . shall be [guilty of a misdemeanor]." Under California case law, a person cannot be guilty of violating § 148(a)(1) if an officer is acting unlawfully because, in that event, the officer would not be discharging his or her duty. *See Susag v. City of Lake Forest*, 115 Cal. Rptr. 2d 269, 273-74 (Cal. Ct. App. 2002); *People v. Olguin*, 173 Cal. Rptr. 663, 666 (Cal. Ct. App. 1981).

[1] Smith also pled guilty to spousal battery under California Penal Code § 243(e). The consequences of that conviction are not at issue in this case.

Smith violated § 148(a)(1) at least three times before the officers came onto the porch and used force against him. He violated § 148(a)(1) when he refused to take his hands out of his pockets, when he refused to put his hands on his head and come down off the porch, and, finally, when he refused to put his hands on his head and turn around. In all three instances, Officers Reinbolt and Quinn issued lawful commands within the proper scope of their duties, and in all three instances Smith resisted, delayed, or obstructed the officers.

Defendants do not dispute that Smith violated § 148(a)(1) before the officers came onto the porch. Officer Quinn stated in his deposition that, based on his training and experience, Smith had violated § 148(a)(1) by the time he had approached the porch.

> Q: As you approached Mr. Smith, what was he doing?
>
> A: [by Officer Quinn]: Standing on or near his porch.
>
> Q: Did he make any threats of injury directed toward you?
>
> A: No.
>
> Q: Did you hear him make any threats of injury directed toward anybody?
>
> A: No.
>
> . . .
>
> Q: When you were approaching Mr. Smith, he was still in disobedience of the officers' commands; is that right?
>
> A: Sure.

. . .

Q: . . . Based on your training, what are the elements for making an arrest for a violation of Section 148 of the Penal Code?

A: Somebody has to obstruct, delay, or resist a police officer in the performance of their duties.

Q: Were the officers engaged in the performance of their duties as they were giving command to Mr. Smith to put his hands on his head and step off the porch?

A: Yes.

Q: Was Mr. Smith's noncompliance with those commands obstructing or delaying the officers in the performance of their duties?

A: Yes.

Q: So based on your training and experience, Mr. Smith – that is, by the time that you're approaching him on the porch – Mr. Smith had violated Penal Code Section 148.

A: Sure.

At oral argument, defense counsel conceded that Smith had violated § 148(a)(1) before the officers had come onto the porch.

On October 27, 1999, Smith pled guilty to a violation of § 148(a)(1) without pleading to any specific set of facts. Smith was sentenced to 36 months' probation. On October 16, 2000, while he was still on probation and was therefore still in "custody" for purposes of habeas, Smith filed this § 1983 suit. *Cervantes v. Walker,* 589 F.2d 424, 425 n.1 (9th Cir. 1978) (describing "custody" under 28 U.S.C. § 2254).

On July 19, 2002, the district court granted summary judgment to defendants. During the pendency of his appeal to this court, Smith's probation ended. Because Smith is no longer in custody, he cannot now file a petition for habeas corpus challenging his conviction under § 148(a)(1).

II. "Necessarily Imply" or "Demonstrate" the "Invalidity of a Conviction or Sentence"

As I will elaborate below, the majority misunderstands the crime of which Smith was convicted and draws an improper inference of what Smith admitted by his guilty plea. Further, the majority misreads our decision in *Cunningham v. Gates,* 312 F.3d 1148 (9th Cir. 2002), to mean that Smith's § 1983 suit is barred by *Heck* because Smith's violation of § 148(a)(1) and the officers' use of force were not "two discrete incidents." Maj. op. at 1309. The majority's decision conflicts with *Heck* itself, with our recent decision in *Sanford v. Motts,* and with decisions of the Third, Seventh, Tenth and Eleventh Circuits.

A. *Heck v. Humphrey*

The question under *Heck* is whether success in Smith's § 1983 suit would "necessarily imply" or "demonstrate" the invalidity of his conviction or sentence under § 148(a)(1). The undisputed factual narrative makes clear that it would not. For a § 148(a)(1) conviction to be valid, a person must have "resist[ed], delay[ed], or obstruct[ed]" a police officer in the lawful exercise of his or her duties. If a police officer uses excessive force, he or she is not acting lawfully. *See Susag,* 115 Cal. Rptr. 2d at 273-74; *Olguin,* 173 Cal. Rptr. at 666. A person therefore cannot validly be

convicted under § 148(a)(1) if the officer used excessive force while the person resisted, delayed, or obstructed the officer.

If Smith had pled guilty to § 148(a)(1) based on his behavior after the officers came onto the porch to subdue him, his suit would be barred by *Heck*.[2] This is so because if Smith were successful in his § 1983 suit, that would necessarily mean that the officers were using excessive force to subdue him and were therefore acting unlawfully. If they were acting unlawfully, Smith's conviction under § 148(a)(1) was invalid.

However, if Smith pled guilty based on his behavior *before* the officers came onto the porch, his suit would not be barred. This is so because if Smith were successful in his § 1983 suit, that success would be based on excessive force that occurred after Smith had already violated § 148(a)(1). In that circumstance, the success of Smith's § 1983 suit would not necessarily imply or demonstrate the invalidity of his conviction or sentence under § 148(a)(1), for the conviction would be based on behavior that took place while Smith stood alone and untouched on his porch.

The facts that are the basis for Smith's plea of guilty to a violation of § 148(a)(1) were not specified in the plea. It is therefore entirely possible that Smith pled guilty to a violation of § 148(a)(1) based on his behavior before the officers came onto the porch. If that is so, a successful § 1983 suit based on excessive force after the officers came on the porch is entirely consistent with a valid conviction

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[2] I assume, for purposes of this statement, that Smith does not have an alternative basis for proceeding under § 1983.

under § 148(a)(1). The majority decision thus directly conflicts with *Heck* in holding that Smith's § 1983 suit is barred.

B. *Sanford v. Motts*

The majority's decision conflicts not only with *Heck* itself, but also with our decision in *Sanford v. Motts*, 258 F.3d 1117 (9th Cir. 2001). In *Sanford*, we held that a successful § 1983 suit based on excessive force did not necessarily imply the invalidity of the plaintiff's conviction under § 148(a)(1). Plaintiff Sanford was involved in an altercation with an animal control officer. After she was handcuffed, Sanford verbally attempted to interfere with the officer's arrest of her boyfriend. The officer then struck her in the face. Sanford pled *nolo contendere* to violating § 148(a)(1) and, like Smith, was sentenced to three years' probation.

As in our case, nothing in the record revealed the factual basis of Sanford's plea. We explained that if the officer's excessive force occurred "subsequent to the time Sanford interfered with [the officer's] duty, success in her section 1983 claim [would] not invalidate her conviction." *Id.* We held that defendants had not established their *Heck* defense because they had not shown the factual basis of Sanford's plea. We held that there was no *Heck* bar even though Sanford's interference with the officer and the officer's application of allegedly excessive force were part of a continuous sequence of events, even though Sanford's interference provoked the officer's use of force, and even though the interference and the force were separated by only a few moments.

In finding no *Heck* bar in *Sanford,* we explained that if the officer "used excessive force subsequent to the time Sanford interfered with his duty, success in her § 1983 claim will not invalidate her conviction." *Id.* at 1120. The same is true here. When Smith stood on his porch, alone and untouched, he violated § 148(a)(1) by refusing to obey the officers' commands. It is uncontested that at that time the officers were acting lawfully and Smith unlawfully. A finding in Smith's § 1983 suit that the officers later used excessive force when they came onto the porch to subdue Smith would have no effect on his conviction under § 148(a)(1). The majority opinion thus directly conflicts with *Sanford* in holding that Smith's § 1983 suit is barred.

C. Decisions of Other Circuits

The majority decision also directly conflicts with decisions of four of our sister circuits. In *Martinez v. City of Albuquerque*, 184 F.3d 1123 (10th Cir. 1999), plaintiff Martinez had solicited sex from a police officer posing as a prostitute. Martinez fled briefly from the police in his car. He then stopped his car, locked the doors, rolled down the window, and protested to the police that he had done nothing wrong. Martinez refused a command to get out of the car. One of the officers reached in and tried to unlock the door. Martinez rolled up the window into [sic] the officer's arm. Another officer then struck Martinez in the face and unlocked the car. The officers then arrested Martinez. The entire incident lasted two to three minutes.

After a bench trial in state court, Martinez was found guilty of violating New Mexico Statute § 30-22-1. There were two subparts of the statute under which Martinez could have been convicted. The first, subpart B, prohibits

"resisting, evading or obstructing an officer [by] intentionally fleeing, [or] attempting to evade[.]" N.M. Stat. Ann. § 30-22-1B. The Tenth Circuit held that if Martinez had been convicted under this subpart of the statute, it was because he intentionally fled in his car. The success of his § 1983 suit "simply had no bearing on his conviction," *id.* at 1126, because Martinez had fled before any force was used against him.

The second subpart under which Martinez could have been convicted, subpart D, prohibits "resisting, evading or obstructing an officer [by] resisting or abusing any . . . police officer in the lawful discharge of his duties." N.M. Stat. Ann. § 30-22-1D. If Martinez was convicted under this subpart, it was because he refused to get out of the car and closed the car window on the officer's arm. The Tenth Circuit explained that a successful § 1983 excessive force suit would not necessarily imply the invalidity of Martinez's conviction under this subpart either:

> [W]hether Martinez resisted arrest by failing to heed instructions and closing his vehicle's window on the officer's arm is . . . a question separate and distinct from whether the police officers exercised excessive or unreasonable force in effectuating his arrest. The state court's finding that Martinez resisted a lawful arrest, even if based on § 30-22-1D, may coexist with a finding that the police officers used excessive force to subdue him.

Id. at 1127.

Both the New Mexico statute and California Penal Code § 148(a)(1) require as an element of the offense that the police officer be engaged in the lawful discharge of his duties. *Compare* N.M. Stat. Ann. § 30-22-1D, and *State v.*

Prince, 972 P.2d 859, 862 (N.M. Ct. App. 1998), *with People v. Simons*, 50 Cal. Rptr. 2d 351, 355 (Cal. Ct. App. 1996). The alleged use of excessive force against both Smith and Martinez immediately followed their resistance or obstruction of the police in the lawful discharge of their duties. Martinez's refusal to exit his car, his rolling up the window, and the officer's striking him, were all part of a continuous sequence of events separated in time by only moments.

Smith's refusal to obey the commands of Officers Reinbolt and Quinn before they came onto the porch and the officers' use of force on Smith after they came onto the porch were part of a continuous sequence of events, just as in *Martinez*. Further, Smith's refusal and the officers' use of force were separated by only a short time, just as in *Martinez*. Indeed, in *Martinez*, and probably in *Sanford*, the elapsed time between the resistance and the use of force was less than in Smith's case.

In *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997), the Third Circuit permitted plaintiff Nelson to proceed with his § 1983 excessive force suit despite his state court conviction under Pennsylvania's statute governing resisting arrest. The statute provides that a person is guilty of resisting arrest if "with the intent of preventing a public servant from effecting a lawful arrest [he] . . . employs means justifying or requiring *substantial force* to overcome [his] resistance." 18 Pa. Cons. Stat. Ann. § 5104. (Emphasis added.) Nelson had run away, disobeying a police officer's order to stop. The officer caught Nelson and, after a struggle, subdued him. Nelson then sat down in a chair. When Nelson got up, the officer hit him with a flashlight and, according to Nelson, used excessive force to subdue him.

In analyzing the *Heck* defense, the Third Circuit carefully analyzed § 5104. Since § 5104 specified only that the defendant must have "employ[ed] means justifying or requiring *substantial* force to overcome [his] resistance," and since Nelson alleged *excessive* rather than substantial force, a successful § 1983 suit "would not throw the validity of the judgment of conviction in the criminal case into doubt." *Id.* at 145. The court therefore allowed Nelson's § 1983 suit to go forward. In *Nelson,* as in *Sanford, Martinez* and our case, Nelson's actions that constituted a violation of the criminal statute and the officer's use of allegedly excessive force were part of a continuous sequence of events and were separated only by a short period of time.

In *Willingham v. Loughnan*, 261 F.3d 1178 (11th Cir. 2001), *cert. granted and judgment vacated on other grounds*, 537 U.S. 801 (2002), plaintiff Willingham was convicted by a state court jury of attempted second-degree murder of one police officer and battery of another police officer. Willingham brought a § 1983 excessive force suit against the officers and obtained a substantial jury verdict. The actions that were the basis for Willingham's criminal conviction and the § 1983 verdict overlapped in time and were part of the same sequence of events. The Eleventh Circuit reviewed the evidence presented in the criminal trial and held that "a finding of excessive force by the jury in this civil case does not necessarily call into question the validity of [Willingham's] criminal conviction." 261 F.3d at 1183. The court therefore refused to hold that Willingham's § 1983 suit was barred by *Heck*. Even more than in *Sanford, Martinez, Nelson* and our case, the facts underlying Willingham's criminal conviction and his

§ 1983 verdict were not "discrete incidents." Maj. op. at 1309.

Finally, in *Robinson v. Doe*, 272 F.3d 921 (7th Cir. 2001), plaintiff Robinson was convicted of a drug offense, based in part on evidence seized in a search that accompanied his arrest. Robinson brought a § 1983 suit alleging excessive force during the arrest. If the arrest had been unlawful, the evidence would have been unlawfully seized, which would have necessarily implied the invalidity of Robinson's criminal conviction. The court nevertheless held that *Heck* did not bar Robinson's § 1983 suit:

> Police might well use excessive force in effecting a perfectly lawful arrest. And so a claim of excessive force in making an arrest does not require overturning the plaintiff's conviction even though the conviction was based in part on a determination that the arrest itself was lawful.

Id. at 923. See also *Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir. 1995) (assuming without deciding that a finding of excessive force would not imply the invalidity of the plaintiff's conviction for resisting a search).

D. Mistakes in the Majority Opinion

The majority opinion makes two crucial mistakes. First, it misunderstands the crime of which Smith was convicted, and as a result draws an incorrect inference from his guilty plea. Second, it misreads our opinion in *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2002), to require that a § 1983 plaintiff show that his criminal conviction and his § 1983 excessive force suit be based on "two discrete incidents." Maj. op. at 1309.

First, the majority misunderstands California law. It concludes from Smith's guilty plea that he admitted his arrest was lawful. That would be true if Smith had pled guilty to resisting arrest. But Smith did not plead guilty to resisting arrest. Rather, he pled guilty to violating § 148(a)(1).

The majority's mistake stems from a confusion about what is prohibited by § 148(a)(1). A violation of § 148(a)(1) is sometimes called, in shorthand, "resisting arrest." *See, e.g., Hernandez v. City of Los Angeles*, 624 F.2d 935, 936 (9th Cir. 1980) ("Hernandez was tried . . . on charges of violating . . . § 148 (resisting arrest)[.]"). If § 148(a)(1) prohibited "resisting arrest," a guilty plea would, indeed, admit that officers were acting lawfully when they performed the arrest, for a person can violate § 148(a)(1) only if officers are acting lawfully. But § 148(a)(1) does not prohibit "resisting arrest." Rather, it prohibits "resist[ing], delay[ing], or obstruct[ing]" an officer in the performance of his or her duties. By pleading guilty, Smith necessarily admitted that the officers were acting lawfully when he violated § 148(a)(1). But defendants concede that Smith violated § 148(a)(1) before the officers came onto the porch. By his plea, Smith thus admitted only that the officers were acting lawfully in giving him commands while he stood alone and untouched.

Second, the majority reads *Cunningham v. Gates* to require that the facts underlying the crime and the use of excessive force be "two discrete incidents." Maj. op. at 1309. The majority particularly relies on a sentence in *Cunningham* stating that Cunningham's § 1983 suit was barred by *Heck* because "there was no break between Cunningham's provocative act of firing on the police and the police response that he claims was excessive." *Cunningham*, 312

F.3d at 1155; *See* Maj. op. at 1308 (quoting *Cunningham*). The majority misreads this sentence to mean that Smith's acts and the officers' response must have been "two discrete incidents" for his § 1983 suit to go forward under *Heck*. Maj. op. at 1309.

The majority misreads *Cunningham* because it fails to examine the crime for which Cunningham was convicted. Cunningham and a partner named Soly had robbed a liquor store. Police officers then exchanged gunfire with Cunningham and Soly, severely injuring Cunningham and killing Soly. Cunningham was convicted by a jury of attempted murder (of the police), felony murder (of Soly), robbery and burglary. Cunningham thereafter brought a § 1983 excessive force suit against the officers.

One of Cunningham's § 1983 claims was that even though he had provoked the officers by shooting at them, the officers had responded excessively to the provocation. We concluded that success on this claim would necessarily be inconsistent with Cunningham's conviction for felony murder, and that the claim was therefore barred by *Heck*. We based our conclusion on the jury instruction for felony murder, which had required the jury to find that Cunningham had "committed an intentional provocative act," that the officer had killed Soly "in response to the provocative act," and that Cunningham's provocative act was a "cause of [Soly's] death." 312 F.3d at 1152. We explained the inconsistency between Cunningham's § 1983 claim and the jury's guilty verdict in a paragraph from which the majority has taken only the first sentence:

> *[T]here was no break between Cunningham's provocative act of firing on the police and the police response that he claims was excessive.* Indeed, in convicting Cunningham of felony murder, the

> jury concluded that the police response was a natural consequence of Cunningham's provocative act. Because the two are so closely interrelated, Cunningham's conviction forecloses his excessive force claim against the . . . officers.

Id. at 1155 (emphasis indicates sentence quoted by the majority).

Once the sentence is understood in context, it is clear that our requirement in *Cunningham* that there have been a "break" between Cunningham's provocative act and the police response was dictated by the crime of which Cunningham was convicted. In his § 1983 claim, Cunningham had asserted that although he had provoked the response by the officers, the response had been excessive. In order for his § 1983 claim to have been successful, there must have been an insufficient link between the provocation and the response, such that the response by the officers went beyond the provocation. We held that if there had been an insufficient link – a "break" between the provocation and the response, this would necessarily have been inconsistent with the jury's verdict that Cunningham was guilty of felony murder, for the felony murder instruction specifically required a causal connection between Cunningham's provocation and the officers' deadly response.

The "break" requirement of *Cunningham* – the requirement that there be, in the words of the majority, "two discrete incidents" – is not a general requirement for § 1983 excessive force suits. Rather, it is a requirement specifically tailored to Cunningham's conviction for felony murder. If it were a general requirement that there be "two separate incidents," our decision in *Sanford,* and our sister circuits' decisions in *Martinez, Nelson*, and *Willingham*

were all wrongly decided, for there was no "break" – in time or causation – in any of those cases.

Even though *Sanford* had been decided only a year and a half before *Cunningham,* the analysis in *Cunningham,* dealing with a conviction for felony murder, and the analysis in *Sanford,* dealing with a conviction under § 148(a)(1), are so distinct from one another that we saw no need in *Cunningham* even to discuss *Sanford.* Our case is, of course, a *Sanford*-type case, in which the § 1983 plaintiff has been convicted under § 148(a)(1). *Cunningham* is as irrelevant to the analysis in our case as it was to the analysis in *Sanford.*

E. Conclusion

In the end, this is a simple case. As an analytic matter, we have already decided it in *Sanford,* and our sister circuits have already decided it in *Martinez, Nelson, Willingham,* and *Robinson.* Smith violated § 148(a)(1) when he disobeyed the lawful commands of Officers Reinbolt and Quinn as he stood alone and untouched on his porch. Smith may or may not be able to succeed on the merits of his § 1983 suit, based on what the officers did after they came onto the porch. But success in that suit would be in no way inconsistent with his guilty plea under § 148(a)(1). That is, success in his § 1983 suit would not "necessarily imply" or "demonstrate" the "invalidity of his conviction or sentence" under § 148(a)(1).

III. Unavailability of Habeas Corpus

When we heard Smith's appeal, his three-year probation had ended and he was no longer in custody. Because Smith is not in custody, he cannot file a petition for habeas

corpus under 28 U.S.C. § 2254. In *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002), we held that a § 1983 plaintiff in that position is not barred by *Heck*. Even if the majority were correct that Smith's § 1983 suit would "necessarily imply" or "demonstrate" the invalidity of Smith's conviction under § 148(a)(1), it is nonetheless required by *Nonnette* to allow Smith's suit to go forward.

We noted in *Nonnette* that "there is language in *Heck* suggesting that the prior overturning of any underlying conviction is invariably a prerequisite for a § 1983 action that implies the conviction's invalidity." *Id.* at 876. But we concluded that Justice Souter's concurrence and Justice Stevens's dissent in *Spencer v. Kemna*, 523 U.S. 1 (1998), indicate that this would be an incorrect reading of *Heck*. *Nonnette*, 316 F.3d at 877-78; *see* 523 U.S. at 19 (Souter, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting). Informed by Justice Souter and Stevens's opinions in *Spencer*, we held in *Nonnette* that a plaintiff who can no longer challenge his conviction because of release from custody is not barred by *Heck* from bringing a suit under § 1983. We joined the Second and Seventh Circuits in so holding. *See Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999).

The plaintiff in *Nonnette* had been in custody, and thus could have filed a petition for habeas corpus, at the time he filed his § 1983 suit. Only while his § 1983 suit was on appeal was he released from custody, and only then did habeas become unavailable. We held in *Nonnette* that even in this circumstance a § 1983 suit may be pursued. *Nonnette* is on all fours with this case. When Smith filed his § 1983 suit, he was still on probation and therefore still in custody for purposes of habeas corpus. While his case was on appeal to us, his probation was completed and he

was released from custody. Because he is no longer in custody, and because habeas corpus is not available to him, our holding in *Nonnette* requires that he be allowed to proceed with his suit under § 1983.

IV. A Road Map for Police

Not only is the majority wrong as a matter of law. It is also grievously wrong as a matter of policy. The majority has provided a road map that will allow police officers and their departments to avoid many, perhaps most, excessive force cases. If a department is concerned that one or more of its officers may have used excessive force, the majority opinion instructs it to press charges under Cal. Penal Code § 148(a)(1) or an equivalent statute. In most cases where there is a possible § 1983 excessive force suit, it will be child's play to obtain a conviction for a violation of § 148(a)(1) or its equivalent. In some of these cases, the would-be plaintiff may be charged and convicted only because the officers and their department want to avoid a § 1983 suit. Many, perhaps most, defendants will be willing to plead guilty to a violation of § 148(a)(1) in return for a probated sentence. Indeed, I cannot help noticing that the plaintiffs in *Sanders* and in this case both pled guilty to violating § 148(a)(1), and that they both received sentences of three years' probation.

If the majority opinion stands, a plea bargain resulting in a conviction under § 148(a)(1) will forever bar a § 1983 excessive force suit. This is a pretty neat trick, but it is not much of a bargain. On one side, the police officers are able to avoid a § 1983 suit for excessive force. On the other, the would-be (and now-barred) § 1983 plaintiff gets a conviction under § 148(a)(1).

V. Conclusion

The majority decision is inconsistent with *Heck* and with our decision in *Sanford*; it is inconsistent with decisions by the Third, Seventh, Tenth, and Eleventh Circuits; and it is inconsistent with our decision in *Nonnette*. The majority decision is also an open invitation to police departments to use charges and plea bargains under § 148(a)(1), or its equivalent, to avoid § 1983 excessive force suits.

I dissent.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS SMITH, Plaintiff, v. CITY OF HEMET, et al. Defendants.	Case No. EDCV 00 00811 VAP (SGLx) **[Motion filed on June 17, 2002.]** **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** (Filed Jul. 19, 2002)

Defendants' Motion for Summary Judgment came before this Court for hearing on July 8, 2002. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion on the basis that Plaintiff's claim is barred under the ruling of *Heck v. Humphrey,* 512 U.S. 477 (1994).

I. BACKGROUND

On August 16, 1999, Hemet police officers responded to a 911 call at Plaintiff Thomas Smith's ("Plaintiff") residence. The officers arrived to find Plaintiff in a state of agitation. [Defendants' Motion for Summary Judgment ("Defs.' Mot.") at 2-5.] Defendant Officer Daniel Reinbolt ("Reinbolt") arrived first. He found Plaintiff standing on his front porch, and asked Plaintiff to take his hands out of his pockets. [*Id.* at 2.] Plaintiff refused and responded with obscenities. [*Id.*; Plaintiff's Opposition ("Pl.'s Opp'n") at 1.] After several more requests, Plaintiff complied. [Defs.' Mot. at 2.]

Defendant Officer David Quinn ("Quinn"), the canine handler, told Plaintiff "to put his hands up and turn around, or he would send the dog [in] and the dog might bite him;" Plaintiff still refused to cooperate. [*Id.* at 3; Pl.'s Opp'n at 2 ("Quinn ordered [Plaintiff] to 'turn around put your hands on your head, now.' [Plaintiff] did not do so, because he feared the dog. . . .").] Defendant Officer Quinn then sprayed Plaintiff in the face with pepper spray. [Defs.' Mot. at 4-5; Pl.'s Opp'n at 2.] At that point, Plaintiff attempted to enter his residence. [Pl.'s Opp'n at 4.] He was bitten by the dog and sprayed with pepper spray a second time; he was not fully handcuffed or in custody. [*Id.* at 4-5.] Plaintiff failed to comply from the time the officers arrived until the time he was handcuffed and placed under arrest. [*See id.* at 2-5.]

The officers arrested Plaintiff on battery and resisting arrest charges. On October 27, 1999, Plaintiff entered a guilty plea to violations of California Penal Code Sections 148 (resisting arrest) and 243(e) (battery). [Defs.' Mot. at 6, Exhibit E ("Ex. E").]

Plaintiff filed his Complaint against Defendants on October 16, 2000, alleging a violation of 42 U.S.C. § 1983. Plaintiff alleges the Hemet police officers used excessive force when they sprayed him with pepper spray and released the police canine on him. [Plaintiff's Complaint ("Compl."); Pl.'s Opp'n at 1.]

In response, Defendants assert they are entitled to summary judgment because 1) the holding in *Heck v. Humphrey,* 512 U.S. 477 (1994), bars Plaintiff's claim, 2) the use of pepper spray and a police canine were objectively reasonable, 3) the City of Hemet, Hemet Police Department, and Chief Hewitt cannot be held liable on a

Monell theory because the officers did not use excessive force, 4) the individual officers are entitled to qualified immunity, and 5) the City of Hemet, Hemet Police Department, and Chief Hewitt do not have a custom, policy, or practice of violating civil rights. The Court finds Plaintiff's claim is barred under *Heck;* it does not reach Defendants' other arguments.

Defendants filed their Motion for Summary Judgment on June 17, 2002. Plaintiff filed Opposition on June 24, 2002. A Reply was filed on July 1, 2002.

II. LEGAL STANDARD

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson,* 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. *Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir. 1998); *Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.,* 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

Where the non-moving party has the burden at trial, however, the moving party need not produce

evidence, negating or disproving every essential element of the non-moving party's case. *Celotex,* 477 U.S. at 325. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case. *Id.*

The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); *Celotex,* 477 U.S. at 324; *Andersen,* 477 U.S. at 256. The non-moving party must make an affirmative showing on all matters. placed in issue by the motion as to which it has the burden of proof at trial. *Celotex,* 477 U.S. at 322; *Anderson,* 477 U.S. at 252. *See also* William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, *Federal Civil Procedure Before Trial* § 14:144.

A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson,* 477 U.S. at 248. In ruling on a motion for summary judgment, the Court construes the evidence in the light most favorable to the non-moving party. *Barlow v. Ground,* 943 F. 2d 1132, 1135 (9th Cir. 1991); *T.W. Electrical Serv. Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630-31 (9th Cir. 1987).

III. DISCUSSION

Viewing the facts in the light most favorable to Plaintiff, the Court finds Defendants have met their burden of showing that Plaintiff's claim is barred by *Heck.* In *Heck,* the United States Supreme Court held that a plaintiff seeking damages pursuant to § 1983, based on factual allegations which would, if proven, render that plaintiff's

previous criminal conviction invalid, is not cognizable unless the previous conviction no longer stands.[1] *Heck*, 512 U.S. at 486-87. If the previous conviction still stands, but the plaintiff's claim would not invalidate the previous conviction, he may be able to recover damages pursuant to § 1983.

Heck thus only bars claims for use of excessive force during the course of an arrest if such claims invalidate the prior conviction. *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *Smithart v. Towery*, 79 F.3d 951, 952-53 (9th Cir 1996). Here, Plaintiff's § 1983 claim directly implicates his conviction for resisting arrest under California Penal Code § 148.

Plaintiff's allegation that the police officers used excessive force during his arrest implies that the arrest was unlawful. Under California law, an essential element of a § 148 violation is that the obstruction of the peace

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[1] *Heck* held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . [w]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id.

officer must occur while the officer is engaged in the performance of his duties.[2] *People v. Olguin,* 119 Cal. App. 3d 39, 44 (1981). "[Officers] cannot be engaged in the lawful performance of [their] duties if [they are] subjecting [the] arrestee to excessive force." *Nuno v. County of San Bernardino,* 58 F. Supp. 2d 1127, 1133 (C.D. Cal. 1999) (citing *Olguin,* 119 Cal. App. 3d at 44). A determination that the officers used excessive force when arresting Plaintiff therefore would imply that the second element of the offense had not been satisfied and that the conviction under § 148 is invalid. *See Heck,* 512 U.S. at 487. Accordingly, Plaintiff's claim necessarily implies the invalidity of his conviction and is barred by *Heck* until such time as he can show his conviction has been reversed, expunged, or otherwise declared invalid.

Plaintiff argues that *Heck* does not preclude his action, citing *Sanford v, Motts,* 258 F.3d 1117 (9th Cir. 2001). The *Sanford* case is distinguishable. There, the Ninth Circuit found that *Heck* did not bar the plaintiff's excessive force claims even though the plaintiff had been convicted of resisting arrest under § 148 because the plaintiff alleged that the defendant police officer punched her in the face after she was arrested and handcuffed. *See id.* at 1118 (emphasis added). In this case, even under Plaintiff's version of the events, the Defendants sprayed him in the face with pepper spray and had the dog bite

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[2] In order to be convicted under section 148, three elements must be satisfied: (1) the defendant willfully resisted, delayed or obstructed a peace officer; (2) the officer was engaged in the performance of his or her official duties; and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her official duties. *See People v. Simons,* 42 Cal. App. 4th 1100, 1108 (1996).

him *while* arresting him.[3] [Pl.'s Opp'n at 1-5 (emphasis added).] Under the circumstances, *Sanford* does not serve to lift the bar imposed by *Heck*. Accordingly, Defendants have met their burden.

IV. PLAINTIFF'S OBJECTIONS TO DEFENDANTS' EVIDENCE IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

The Court overrules the following objections:

1) Officer Dave Quinn's declaration
   a. paragraph 33, lines 16-23
2) Officer Daniel Reinbolt's declaration
   a. paragraph 2, lines 10-13
   b. paragraph 10, lines 26-27

The Court sustains the following objections:

1) Officer Nate Miller's declaration
   a. paragraph 2, lines 7-9
   b. paragraph 3, lines 10-13
2) Officer Daniel Reinbolt's declaration
   a. paragraph 2, lines 7-13

Paragraph 5 of Officer Dave Quinn's declaration was offered and considered by the Court only for the issue of

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[3] Plaintiff himself admits that "[J]ust before [the] bite, officers were yelling at [Plaintiff] to release has shoulder or arm; [Plaintiff] . . . was keeping his arm tucked in, underneath is body, so that 'the animal wouldn't get it.'" [Pl.'s Opp'n at 5.]

the officer's subsequent acts, i.e., driving to the loaction [sic]. The Court does not rule on Plaintiff's other objections as they are not material to the Court's ruling.

V. CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment is GRANTED.

Dated: July 19, 2002 /s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THOMAS SMITH, Plaintiff, v. CITY OF HEMET, et al. Defendants.	)	Case No. EDCV 00-00811-VAP (SGLx) **FINAL JUDGMENT** (Filed Jul. 19, 2002)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Pursuant to the Order filed herewith, IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is GRANTED. The Court orders that such judgment be entered.

Dated: July 19, 2002

/s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS SMITH, Plaintiff-Appellant, v. CITY OF HEMET, a municipal corporation; HEMET POLICE DEPARTMENT; LEE EVANSON; DAVE QUINN; AARON MEDINA; REINBOLT; TRAINER; NATE MILLER; PETER HEWITT, Defendants-Appellees.	No. 02-56445 D.C. No. CV-00-00811-VAP ORDER (Filed Jun. 9, 2004)

Before: SCHROEDER, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Penal Code

§ 148. Resisting, delaying or obstructing officer or emergency medical technician; interference with public safety radio communications; removal or taking of weapon; punishment

(a)(1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

(3)

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No. 04-1374

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2004

CITY OF HEMET, DAVE QUINN, AARON MEDINA, DANIEL REINBOLT, NATE MILLER, PETER HEWITT, and HEMET POLICE DEPARTMENT,
Petitioners,

vs.

THOMAS SMITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S OPPOSITION TO PETITIONERS' WRIT OF CERTIORARI

Respondent Thomas Smith submits this brief in opposition to the petition for writ of certiorari filed by petitioners City of Hemet, Dave Quinn, Aaron Medina, Daniel Reinbolt, Nate Miller, Peter Hewitt, Lee Evanson and the Hemet Police Department.

Regarding summary judgment in petitioners' favor based on this Court's decision in *Heck v Humphrey*, 512 U.S. 477 (1994), petitioners concede that the court of appeals' decision does not conflict with the decision of any other circuit. Nor does the court of appeals' application of *Heck* raise any unresolved issue of national importance. Instead, petitioners simply argue that the Ninth Circuit misapplied a "properly stated rule of law" which, as this Court knows, is not a basis for granting review. SUP. CT. R. 10.

The petition is premature with respect to all three "use of force" issues listed because the *en banc* panel remanded the case to the district court to determine them. Thus, there is no final decision on these issues for this Court to review making this case an inappropriate vehicle for this Court to decide the issues presented by petitioners. Regardless, the claimed conflicts in the circuits do not exist and there is no need for High Court intervention.

Furthermore, petitioners misstate the *en banc* decision. The court of appeals did not establish a new substantive test for excessive force claims; it simply found that consideration of less injurious means for arresting a suspect may be relevant under the "objective reasonableness" standard of *Graham v. Connor*, 490 U.S. 386 (1989). Contrary to petitioners'

argument, the *Graham* analysis has never been limited to three factors; the factfinder must look to the totality of circumstances to determine whether a particular use of force was reasonable.

As to the issue of the definition of "deadly force" under *Tennessee v. Garner*, 471 U.S. 1 (1985), the *en banc* decision adopted the definition used by other circuits that have addressed the issue, which is the definition used by police departments across the country, the United States Department of Justice, *and* the Hemet police department.

Finally, petitioners also seek an advisory opinion from this Court that the use of a police dog to maul a suspect can *never* be considered "deadly force" under *Tennessee v. Garner*. Such an opinion would be premature in the procedural posture of this case and would be inconsistent with existing case law in the circuit courts. The *en banc* decision does not resolve this issue; it merely remands the issue for resolution on a full evidentiary record.

STATEMENT OF THE CASE

A. Statement of Facts

The facts about what petitioners knew upon arriving at respondent's home are largely undisputed. In the evening hours of August 16, 1999, respondent's wife, Cynthia Smith, called the Hemet police, complaining that her husband Tom was " 'hitting her and/or was physical with her.' " When asked if there were weapons Mrs. Smith said no, and further stated that her husband was in pajamas. 394 F.3d at 693 (Pet. App. 3).

Upon the first officer's arrival he began ordering Mr. Smith to take his hands out of his pockets and come off the porch. Mr. Smith refused; he cursed and demanded that the

officer approach him. Other officers arrived, including the dog handler Quinn. The officers gave more commands, one of which Mr. Smith finally obeyed (he took his hands out of his pockets), others of which he disobeyed – he did not put his hands on his head, did not walk towards the officers, and did not turn around. 394 F.3d at 693-94 (Pet. App. 3-4).

Quinn warned Mr. Smith that the dog may be used and may bite him; Smith, though, still did not obey commands. Finally, after Mr. Smith had refused to obey the dog handler Quinn's final commands, Quinn sprayed Mr. Smith with oleoresin capsicum aka pepper spray, a painful and sometimes dangerous weapon.[1] Mr. Smith swore and tried, unsuccessfully, to enter the house. Officers came up on the porch, slammed Mr. Smith against the door, threw him down on the porch. At about the same time, in response to Quinn's command the dog began attacking Mr. Smith. The dog bit him on his shoulder and neck, finally sinking its teeth into his arm. 394 F.3d at 694 (Pet. App. 4).

With four officers on Mr. Smith and the dog biting him, Mr. Smith finally agreed to comply with the officers' commands. He remained, though, on the ground, curled up with one of his hands tucked away out of the officers' view, in an effort to protect himself from the dog. Quinn ordered the dog to bite again; the dog bit Mr. Smith's left side and shoulder. Officers dragged Mr. Smith off the porch where the dog bit him a third time on Quinn's command as Mr. Smith was shielding his arm from the dog. During all this, the officers sprayed Mr. Smith with pepper spray at least four times – two sprayings occurred before the dog attack and at least one afterwards when Mr. Smith was pinned to the ground. The

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[1] *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1200 n. 7 (9th Cir. 2000), *vacated and remanded on other grds.*, 534 U.S. 801 (2001), *reinstated* 276 F.3d 1125 (9th Cir. 2002).

officers handcuffed Mr. Smith, and sprayed his eyes with water (supposedly to wash out the pepper spray). Paramedics arrived to treat his dog bite injuries. 394 F.3d at 694 (Pet. App. 4-5).

Following his arrest, Mr. Smith was charged with two misdemeanor counts: violations of Cal. Penal Code § 148 (resisting, delaying an officer), and Cal. Penal Code § 243(e) (battery on a spouse). He pled guilty to both counts. 394 F.3d at 694 (Pet. App. 5-6 & n.2).

B. Procedural History

Respondent filed suit under 42 U.S.C. § 1983, alleging that petitioners used excessive force in violation of the Fourth Amendment during the course of his August 16, 1999 arrest. Defendants – petitioners in this Court – were the City of Hemet, the Hemet Police Department, and Hemet Police Officers Dave Quinn, Nate Miller, Aaron Medina, Daniel Reinbolt, and then Hemet Police Chief Peter Hewitt. 394 F.3d at 694-95 (Pet. App. 6).

Defendants moved for summary judgment. Defendants asserted various grounds, including qualified immunity and a claim that the action was barred by plaintiff's guilty plea to violating Cal. Penal Code § 148, resisting/delaying an officer. *See Heck v. Humphrey*, 512 U.S. 477 (1994). The trial court agreed based on *Heck*, and dismissed the action. 394 F.3d at 695 (Pet. App. 6).

The initial Ninth Circuit panel, in a 2-1 decision, affirmed based on *Heck*. The majority concluded that since an officer does not act lawfully when he uses excessive force, success on Mr. Smith's § 1983 suit should imply that his Cal. Penal Code § 148 conviction was invalid. Pet. App. 44-46. The Ninth Circuit granted rehearing *en banc* and, in an 8-3 decision, concluded that given the breadth of Cal. Penal Code § 148 *and* petitioners' concession that Mr. Smith violated § 148

before any officer used force, success on the § 1983 suit would not "necessarily imply" that the § 148 conviction was invalid. 394 F.3d at 695-99 & n.3 (Pet. App. 7-13 & n.3). The *en banc* panel rejected petitioners' alternative argument that summary judgment should be affirmed because the force was reasonable as a matter of law. 394 F.3d at 700-04 (Pet. App. 17-24). The *en banc* panel also took the occasion to conform Ninth Circuit law with that in other circuits defining "deadly force," and adopted the definition used by other circuits, federal and state law enforcement, and petitioners themselves. 394 F.3d at 704-07 (Pet. App. 25-30).

REASONS FOR DENYING THE PETITION

I. THE *EN BANC* DECISION IS NOT IN CONFLICT WITH *HECK V. HUMPHREY* OR THE DECISIONS OF OTHER CIRCUITS, AND TURNS ON AN INTERPRETATION OF CALIFORNIA LAW RATHER THAN AN UNRESOLVED ISSUE OF NATIONAL IMPORTANCE.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court held that where success on a suit under 42 U.S.C. § 1983 lawsuit would "necessarily" imply that a criminal conviction was invalid – a conviction has not been expunged or overturned – then the § 1983 lawsuit was barred. In short, a litigant cannot use the § 1983 lawsuit to collaterally attack the criminal conviction. 512 U.S. at 486-87.

An easy application of this rule was in *Heck*. There, the § 1983 plaintiff was in jail, having been convicted of manslaughter. He sued the prosecutors and their investigator under § 1983, claiming they had suppressed and destroyed evidence which would have prevented his conviction and

imprisonment. Obviously, success on the § 1983 suit would necessarily imply that the plaintiff's valid criminal conviction was invalid.

Heck's rule can also apply to a Fourth Amendment false arrest claim. In footnote 6, using an example based on New York state law, Justice Scalia described how a plaintiff who has been convicted of resisting a ***lawful*** arrest, cannot thereafter sue under § 1983 claiming he was seized in violation of the Fourth Amendment. After all, a seizure in violation of the Fourth Amendment is "necessarily" inconsistent with a *lawful* arrest. 512 U.S. at 487 n.6

But *Heck's* rule does not and cannot apply to a case where a plaintiff sues under § 1983 claiming excessive force, where the excessive force occurs *after* the criminal conduct for which the plaintiff was convicted. Take the facts of *Tennessee v. Garner*. Edward Garner burglarizes the home. The officer arrives but Garner runs away with the officer giving chase. The officer orders Garner to stop or he will shoot. Garner doesn't stop; he keeps running. In response, the officer shoots Garner. Garner violated Cal. Penal Code § 148.[2] He knowingly disobeyed the officer's commands to stop; at the same time the officer was acting lawfully in giving those commands. But assuming Garner was later convicted of violating § 148, that

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[2] California's "resisting arrest" statute – Cal. Penal Code § 148 – is not limited to arrests; it covers *any conduct* that "resists, delays, or obstructs [the police officer] . . . in the discharge or attempt to discharge *any* duty . . ." (emphasis added). As explained by one California court: "[Section 148] not only proscribes resisting arrest, but [] also limits other forms of hindering a police officer or other public official from executing the duties of his or her office." *People v. Lopez*, 188 Cal. App. 3d 592, 599 (1986). Consequently, unlawful resistance or delay has been found in instances before an officer used any force, and in instances where no arrest was even contemplated or force used. *In re R*, 12 Cal. App. 3d 80, 86 (1970) (juvenile properly convicted for violating § 148 when he interfered, through verbal harassment, with officers' questioning of others); *People v. Cooks*, ___ Cal. App. 2d Supp. ___, 58 Cal. Rptr. 550, 552 (1967). (Conviction of bartender who urged non-cooperation with police.).

conviction could not bar him from suing for excessive force. Put differently, Garner could not defend against the § 148 charge based on his flight by claiming the officer used unlawful deadly force in shooting him. Garner's § 148 violation – his flight – was complete upon his refusal to stop when told to do so. Thus, success on his § 1983 claim would not "necessarily imply" that his § 148 conviction was invalid.

To further illustrate the correctness of the *en banc* decision, assume that instead of the officers siccing a dog on Tom Smith, knocking him down, and macing him, the officers simply stepped on the porch, grabbed Mr. Smith's arms, and handcuffed him. Had that occurred Mr. Smith would still be guilty of violating Cal. Penal Code § 148. He delayed the officers in the lawful performance of their duties by (a) refusing to put his hands on his head, (b) refusing to turn around, and (c) refusing to step off the porch. *People v. Roberts*, 131 Cal. App. 3d Supp. 1 (1982) (defendant convicted of violating Penal Code § 148 by interfering with officers through cursing, verbal threats, and stepping between officer and driver); *see also* fn. 2, *supra*.

Hence, because the evidence established that Mr. Smith violated § 148 before any officer touched him or used any force against him, 394 F.3d at 697 & n.3 (Pet. App. 11 n.3) (dog handler Quinn admits Mr. Smith violated § 148 before any officer used force), a finding that the officers used excessive force does *not* "*necessarily* imply" that Mr. Smith's Penal Code § 148 conviction was invalid.

The *en banc's* reasoning follows that employed by other circuits in applying *Heck*. The circuits have found that, given the facts before the courts, convictions for crimes generically labeled "resisting arrest" are not "necessarily" called into question by § 1983 actions alleging excessive force: *Willingham v. Loughnan*, 261 F.3d 1178, 1183 (11th Cir.

2001), *cert. granted and judgment vacated on other grds.*, 537 U.S. 801(2002); *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1127 (10th Cir. 1999); *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997). The *en banc* decision is also consistent with the Ninth Circuit's earlier decision in *Sanford v. Motts*, 258 F.3d 1117, 1119-20 (9th Cir. 2001) ("Hence, if [Officer] Motts used excessive force subsequent to the time Sanford interfered with his duty [in violation of Cal. Penal Code § 148], success in her section 1983 claim will not invalidate her conviction. *Heck* is no bar.").

Tellingly, defendants do not cite a single decision from any federal court that supposedly conflicts with the *en banc* reasoning in its *Heck* analysis. Instead, petitioners attempt to construct a theory that respondent, because of his guilty plea, must be found to have admitted all facts which *might* have been introduced at a criminal trial and which *might* have formed the basis for a criminal conviction even where a conviction could have been based on several different facts.[3] However, *Heck* applies only when a subsequent civil rights action "*necessarily* impl[icates]" a prior state conviction. Here, petitioners could not establish that respondent's § 1983 lawsuit "necessarily impl[ies]" that his prior conviction was invalid since – as petitioners admitted, see Pet. App. 11 – respondent's § 148 violation occurred *before* any officer used force. Thus, *Heck* did not preclude this lawsuit.[4]

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[3] Petitioners' theory is heavily dependent on an analysis of California law, not federal civil rights principles. This Court ordinarily defers to the Circuit Courts on questions of state law. This is yet another reason why this case is an inappropriate candidate for review in this Court.

[4] For similar reasons petitioners' reliance on *Susag v. City of Lake Forest*, 94 Cal. App. 4th 1401 (2002) is misplaced. Unlike the unsuccessful § 1983 *Susag* plaintiff, here Mr. Smith presented evidence that the officers arrested him for violating Cal. Penal Code § 148 *before* any officer used any force. Pet. App. 11 n.3 (*quoting* Quinn's deposition testimony wherein he admits Mr. Smith violated § 148 by disobeying the officers commands, all

Petitioners' floodgates argument, Pet. App. 13, is demonstrably false. Ninth Circuit law pre-*Heck* allowed a § 1983 action notwithstanding a § 148 conviction unless it could be shown that the lawfulness of the officer's use of force was adjudicated in the criminal proceedings. *Hernandez v. City of Los Angeles*, 624 F.2d 935, 937-38 (9th Cir. 1980). There is no evidence of any flood of cases arising because of *Hernandez* and the decision below will not cause one either.

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of which, per Quinn, occurred before any officer used force). 94 Cal. App. 4th at 1410 (*Susag* plaintiff failed to present "evidence of excessive force [which] would not necessarily imply the invalidity of his conviction.").

II. THE *EN BANC* DECISION IMPLEMENTS *GRAHAM V. CONNOR* AND DOES NOT REQUIRE OFFICERS TO ADOPT THE LEAST INTRUSIVE MEANS OF SUBDUING A SUSPECT.

Contrary to petitioners' suggestion, this Court in *Graham v. Connor*, 490 U.S. 386 (1989) did not limit the objective reasonableness test to just three factors (severity of crime, immediacy of threat, resisting or evading arrest). While the Court mentioned these factors, the Court was careful to note that its list was not exclusive; the factfinder must pay "careful attention to the facts and circumstances of each particular case" while considering the " 'totality of the circumstances.' " 490 U.S. at 396; *see also Fikes v. Cleghorn*, 47 F.3d 1011, 1013-14 (9th Cir. 1995) ("[t]he three factors the Court [in *Graham*] listed illustrate how the jury could address the question of excessive force under a Fourth Amendment test, but they do not constitute the exclusive test for whether force is excessive.").

The *en banc* decision did *not* say that any time one can hypothesize a less-injurious means of capturing a suspect, the means actually used become unreasonable. Rather, the decision noted that among the factors to be considered is whether the force used was necessary. That is, could the police have accomplished their objective by simply grabbing Tom Smith, rather than by siccing a dog on him? 394 F.3d at 703-04 (Pet. App. 22-23). The decision's discussion of this point was part and parcel of its overall analysis using the *Graham* factors. Equally clear, the decision's holding did not turn on this factor.

The *en banc* decision did not err in allowing the district court on remand to consider whether lesser intrusive means were available to the officers as part of the *Graham* totality of the circumstances analysis, nor was it error for the court of appeals to allow evidence of accepted law enforcement

standards, including the policies of the Hemet Police Department.[5] Pet. App. 22-23. In *Graham*, this Court directs the factfinder's inquiry to include *all* the facts and circumstances relating to a use of police force. 490 U.S. at 396. Those facts and circumstances include whether the force used was reasonably necessary to accomplish the law enforcement objective.

The *en banc* decision's discussion of alternative methods of capture is neither novel nor surprising. Decisions by this Court recognize, as one factor bearing upon reasonableness, the intrusiveness of a particular seizure and the necessity for the means employed. While not determinative, a seizure's intrusiveness and whether it could be avoided consistent with law enforcement interests, are obviously relevant to the totality of circumstances. In short, they are not, as petitioners argue, irrelevant.

In *Illinois v. McArthur*, 531 U.S. 326 (2001), the Court upheld police conduct that prevented a man from entering his home while the police obtained a search warrant: "Temporarily keeping a person from entering his home, a consequence whenever police stop a person on the street, is considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search." 531 U.S. at 336.

Similarly, in *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), the Court upheld a search by a dog walking around a car because it was "much less intrusive than a typical

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[5] This Court has frequently referred to similar standards in considering the constitutionality of police or law enforcement practices. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (relying in part on Department of Corrections regulation, Court concludes that guards' conduct violated "clearly established statutory or constitutional rights"); *Tennessee v. Garner*, 471 U.S. 1, 19 (1985) (Court finds additional support for its holding by noting "[a]ctual departmental policies" were in agreement with the Court's conclusion.).

search," whereas in *Bond v. United States*, 529 U.S. 334 (2000), the Court found the seizure unreasonable because, *inter alia*, "Physically invasive inspection is simply more intrusive than purely visual inspection." 529 U.S. at 337.

In explaining its decision in *Schmerber v. California*, 384 U.S. 757 (1966), the Court in *Winston v. Lee*, 470 U.S. 753 (1985), stated that "[t]he search was not more intrusive than reasonably necessary to accomplish its goals." 470 U.S. at 759. Or as the Court noted in *United States v. Place*, 462 U.S. 696, 705 (1983), "seizures . . . vary in intrusiveness"; thus, "some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure . . ."

These decisions' rationale affirm that a seizure conducted in a manner which unnecessarily causes injury *may* violate the Fourth Amendment regardless of whether the seizure itself may be justified. Nearly 40 years ago the President's Commission on Law Enforcement made the same point: "Officers should not be permitted to [use deadly force] when lesser force could be used [or] when the officer believes that the suspect can be apprehended reasonably soon thereafter without the use of deadly force." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 189 (1967).

The *en banc* decision does not, as petitioners claim, enact a new substantive standard governing the reasonableness of the use of force. Police officers do not have to demonstrate that they used only the least intrusive means to effect an arrest. The decision merely finds that less injurious methods of capture may be a factor, among others, appropriately considered in the *Graham v. Connor* calculus.

IV. THE *EN BANC* DECISION BRINGS THE NINTH CIRCUIT IN LINE WITH OTHER CIRCUITS AND LAW ENFORCEMENT ON THE DEFINITION OF DEADLY FORCE.

In *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1997), a Ninth Circuit panel defined deadly force to require a high likelihood of *death*; force likely to cause serious injury but unlikely to *kill* (that is, less than 50/50 probability of death) was not deadly. 139 F.3d 661, 663. In reaching this conclusion the panel acknowledged its definition was contrary to that used by other circuits ("Other circuits do seem to have adopted the [death or serious injury] definition of deadly force . . ." 139 F.3d at 662). Not acknowledged by that panel was that its definition was also contrary to that used by *law enforcement.*

In overruling *Vera Cruz* and holding that force which creates "a substantial risk of causing death or serious bodily injury" is deadly, 394 F.3d at 693 (Pet. App. 2-3), the *en banc* decision charts no new direction on the issue of "deadly force" in § 1983 actions. Instead, the *en banc* decision brought the Ninth Circuit in line with the other circuits which have considered the question.[6]

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[6] *See, e.g., Gutierrez v. City of San Antonio*, 139 F. 3d 441, 446 (5th Cir. 1998) (deadly force "creates a substantial risk of death or serious bodily injury"); *Estate of Phillips v. City of Milwaukee*, 123 F. 3d 586, 593 (7th Cir. 1997) (same); *In re City of Philadelphia Litigation*, 49 F.3d 945, 966 (3rd Cir. 1995) (same); *Ryder v. City of Topeka*, 814 F. 2d 1412, 1416 n.11 (10th Cir. 1987) (same); *Robinette v. Barnes*, 854 F. 2d 909, 912 (6th Cir. 1988) (same); *Pruitt v. City of Montgomery*, 771 F. 2d 1475, 1479 n.10 (11th Cir. 1985) (same); *Mattis v. Schnarr*, 547 F. 2d 1007, 1009 n.2 (8th Cir. 1976) (*en banc*) (same), *vacated as moot sub nom., Ashcroft v. Mattis*, 431 U.S. 171 (1977).

Petitioners' argument that the Eight Circuit "has expressly adopted the Ninth Circuit's" *Vera Cruz* definition, Pet. 27, is wrong. While the Eighth Circuit panel in *Kuha v. City of Minnetonka*, 365 F.3d 590, 598 n.3 (8th Cir. 2004), stated it found *Vera Cruz's* reasoning "persuasive," the statement was dicta – the panel concluded that the dog attack at issue was not deadly force even using the death or serious injury definition. Morever,

Conspicuously omitted from petitioner's argument is any challenge to this statement in the *en banc* decision:

> Equally important for this case, [the deadly force definition the court adopted] is the definition that California and the Hemet Police Department use. Adopting the common definition of deadly force should impose no more of a burden on law enforcement officials than already exists throughout the nation-- a burden that most law enforcement officials have voluntarily chosen to impose upon themselves.

394 F.3d at 706 (Pet. App. 28).

Not only do petitioners ignore this statement, without expressly saying so they argue as if the *en banc* decision forces them to adopt a definition they and law enforcement reject. The truth is as stated by the *en banc* decision. Law enforcement generally, and the Hemet Police Department in particular, define deadly force to include force likely to cause serious injury:

> • "**Deadly force** is the use of any force that is likely to cause death or serious bodily injury." Attachment B, United States Attorney General October 17, 1995 Memorandum on Resolution 14;
>
> • "There is general agreement [among police agencies] that the term [deadly force] means force reasonably capable of causing death or great bodily harm." W. GELLER & M. SCOTT, DEADLY FORCE: WHAT WE KNOW, 23 (Police

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inexcusably for a 3 judge circuit decision bound by an earlier *en banc* decision, *Kuba* made no mention of the earlier and contrary result reached *en banc* in *Mattis v. Schnarr, supra.*

Executive Research Forum 1992) ("DEADLY FORCE");

- The Intentional Association of Chiefs of Police ("IACP") in its Model Policy for the use of force, deadly and non-deadly, defines "deadly force" as "[a]ny use of force that is likely to cause death or *serious bodily harm*." DEADLY FORCE, *supra*, at 478 (emphasis added);

- Petitioner Hemet Police Department defines deadly force as "any force which has a reasonably likelihood of causing death *or serious injury*" [emphasis added]. Hemet General Order No. U-102 ¶4(D); 394 F.3d at 706 (Pet. App. 28).

VI. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER THE USE OF POLICE DOGS CAN AMOUNT TO "DEADLY FORCE"; REGARDLESS THE ISSUE IS NOT NOW BEFORE THIS COURT.

The *en banc* decision does not hold that the use of the police dog in this case or any other constituted "deadly force." As the decision stated:

> We need not here determine whether the use of a police dog to subdue a suspect constitutes deadly force generally or the circumstances under which such use might constitute such force. Having announced the definition of "deadly force" we leave to the district court the first opportunity to apply the concept to the facts of this case. We note only that while we have not in any of our prior cases

> found that the use of police dogs constituted deadly force, we have never stated that the use of such dogs cannot constitute such force.

394 F.3d at 707 (Pet. App. 30).

That conclusion is unsurprising. Whether a particular implement is "deadly" or not depends on the facts showing the manner of use and risk of serious injury or death. So while the Sixth Circuit in *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) concluded that the police dog attack at issue did not constitute "deadly force," it did so expressly on the *absence* of evidence showing likely serious injuries. 854 F.2d at 912. Under different evidence, the Sixth Circuit observed, the factfinder may conclude otherwise, *i.e.*, given the evidence the police dog attack may be deadly force. *Id.*, at 913. *See also Marley v. City of Allentown*, 774 F. Supp. 343, 345-46 (E.D. Pa. 1991) (police dog attack; jury allowed to determine whether police dog attack was deadly force), *aff'd without opinion*, 961 F.2d 1567 (3d Cir. 1991); *Mathis v. Parks*, 741 F. Supp. 567, 572 & n.3 (E.D.N.C. 1990) (court found a full force blow to the abdomen using the knee was "deadly force" because such force may "cause serious bodily harm").

Because whether a dog or other device constitutes deadly force is a fact-based inquiry (*i.e.*, what is the risk of death or serious injury?), there must be a factual record addressing the issue. Here, the trial court never reached this issue for that court granted judgment based solely on *Heck* grounds. Thus, the *en banc* decision wisely remanded to have the district court consider this issue in the first instance, and make the necessary factual findings. That, respondent submits, is the appropriate way to proceed. This Court should wait until after the question of whether the use of a police dog may

constitutes deadly force is presented with a full factual record.[7] It is possible that this case may present that opportunity in the future but not in its current procedural posture.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: May 16, 2005

Paul L Hoffman,

Counsel of Record

AND

Robert Mann

Donald W. Cook

John C. Burton

Michael Morrison

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[7] Some years ago the medical profession noted the alarming increase of serious injuries from police dog attacks. Snyder and Pentecost, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS OF EMERGENCY MEDICINE 983 (September, 1990) (finding that police dog attacks were increasing and causing injuries far more serious than that caused by ordinary dogs and comparable in some ways to extremity injuries caused by gunshot or knife attacks).

(4)

No. 04-1374

In The Supreme Court of the United States

CITY OF HEMET, DAVE QUINN, AARON MEDINA, DANIEL REINBOLT, NATE MILLER, PETER HEWITT, LEE EVANSON and HEMET POLICE DEPARTMENT,

Petitioners,

v.

THOMAS SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THE EN BANC OPINION DIRECTLY CONFLICTS WITH *HECK v. HUMPHREY*, 512 U.S. 477 (1994) BY ALLOWING A CRIMINAL DEFENDANT TO REPUDIATE THE FACTUAL BASIS AND THUS NECESSARILY IMPLY THE INVALIDITY OF A CONVICTION BASED UPON AN UNCONDITIONAL GUILTY PLEA.

This case presents an important issue concerning application of this Court's decision in *Heck v. Humphrey* to the most common disposition of criminal charges – a plea bargain. The Ninth Circuit's en banc decision has improperly strait jacketed application of *Heck* to convictions based on guilty pleas by requiring defendants to somehow establish the factual basis of the plea when the criminal defendant has entered a general guilty plea and deliberately foreclosed presentation of evidence in the underlying criminal proceeding.

Respondent's opposition to the petition contains only a single paragraph addressing the guilty plea issue (Opposition p. 8), and even then does not specifically address the arguments raised in the petition. Instead, respondent simply echoes the Ninth Circuit's analysis, asserting that since Smith engaged in multiple acts which constituted a violation of California Penal Code section 148, everything from disobeying an officer's verbal commands, to physically resisting the officer's application of force, the precise factual basis of his conviction cannot be determined and, hence, the civil rights action does not "necessarily" imply the invalidity of or implicate the criminal conviction. (Opposition p. 8.) But neither the Ninth Circuit nor

respondent are free to ignore the effect of a guilty plea under California law.

By pleading guilty, Smith relieved the prosecution of having to make a record, let alone prove the specific charges or introduce any factual basis for the charge. (Petition p. 10.) And significantly, where, as here, there are multiple acts which might form the basis of criminal charges, the guilty plea forecloses future prosecution on any of the acts under the Double Jeopardy Clause. (*Id.* pp. 11-12.) Thus, respondent's assertion that the guilty plea concerns only facts "which *might* have been introduced at a criminal trial and which *might* have formed the basis for a criminal conviction" (Opposition p. 8) is a flat misstatement of the effect of a guilty plea. As noted, it is an admission of the factual basis of the charges, including all of the facts on which the charges may be based and, hence, for that reason forecloses future prosecution on any factual basis for the charges.

This repudiation of a guilty plea is inconsistent with *Heck* in two fundamental ways. First, it is inconsistent with common law claims for malicious prosecution to which the Court analogized in *Heck*. A malicious prosecution claim cannot be brought where there has been a guilty plea, because the plea does not constitute a "favorable termination" of the underlying action. (Petition pp. 11-12.) Respondent does not even attempt to address this issue.

Second, allowing Smith to effectively repudiate his general guilty plea by now contending that he did not plead guilty to physically resisting the officers – thus admitting their lawful use of force – undermines the integrity of the criminal proceedings and direct review of that conviction through the state criminal appellate

process or federal habeas corpus. By pleading guilty, Smith shielded himself from further prosecution for any of the acts which constituted resisting arrest by having jeopardy attach, and at the same time deliberately elected to waive the right to attack the factual basis of his conviction. (Petition p. 10.) Allowing a civil suit under these circumstances does more than simply "imply" the invalidity of the underlying conviction. It is difficult to imagine conduct that more undermines the integrity of a criminal conviction and the processes for direct review of such a conviction, than by allowing a defendant to manipulate the system by taking advantage of a plea bargain to limit exposure to a more severe sentence or further prosecution, but then repudiate the broad scope of the plea when it is convenient to do so in a civil rights action. This is the very sort of gamesmanship that *Heck* sought to foreclose.

The Ninth Circuit's decision is flatly inconsistent with *Heck*, and erodes application of *Heck* to the most common basis for conviction – a guilty plea. It is therefore essential that this Court grant certiorari.

II.

THE EN BANC DECISION EXPRESSLY INCORPORATES A "LESS INTRUSIVE ALTERNATIVES" STANDARD INTO EVALUATION OF USE OF FORCE UNDER THE FOURTH AMENDMENT, IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *GRAHAM v. CONNOR*, 490 U.S. 386 (1989), THIS COURT'S REJECTION OF THAT PRINCIPLE IN OTHER FOURTH AMENDMENT CASES, AND THE DECISIONS OF OTHER CIRCUITS.

Respondent asserts the Ninth Circuit did not alter the objective reasonableness test set forth by this Court in

Graham v. Connor, 490 U.S. 386, by holding that in evaluating reasonable use of force by police officers a jury could consider the availability of less intrusive alternatives. Echoing the en banc decision, Smith argues that the availability of lesser intrusive alternatives is part of the "totality of the circumstances" test to determine whether the force was reasonable. According to Smith, "[w]hile not determinative, a seizure's intrusiveness and *whether it could be avoided* consistent with law enforcement interests, are obviously relevant to the totality of circumstances." (Opposition p. 11, emphasis added.)

However, *Graham* itself says nothing about consideration of less intrusive alternatives as part of, or in addition to, the three factor test. More critically, as noted in the petition, this Court has expressly held in the context of other Fourth Amendment cases, that whether a particular search or seizure "could be avoided" by employing less intrusive means was irrelevant in evaluating the reasonableness of a particular search or seizure. (Petition pp. 17-18.) Respondent does not address this Court's clear holding in those cases. Nor do any of the cases Smith cites (Opposition pp. 11-12) purport to discuss, let alone adopt a "less intrusive means" analysis in evaluating the reasonableness of a particular search or seizure under the Fourth Amendment.[1]

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[1] For example, the passage cited from *Illinois v. MacArthur*, 531 U.S. 326 (2001) simply distinguishes that case from an earlier decision involving vastly different facts where the Court had held a warrantless entry into a home to be illegal. In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), this Court did not *uphold* "a search by a dog walking around a car because it was 'much less intrusive than a typical search'" (Opposition pp. 11-12). This Court held there was no "search" at all. *See* 531 U.S. at 40 [Use of such dogs "does not transform the seizure

(Continued on following page)

Respondent also ignores the direct conflict between the Ninth Circuit's en banc decision and the decisions of the Seventh, Eighth, Tenth and Eleventh Circuits which have expressly held that the availability of less intrusive alternatives was not relevant to the reasonableness inquiry under *Graham*. (Petition pp. 20-21.) Moreover, the Eighth and Tenth Circuits have expressly held that the very sort of expert testimony on less intrusive alternatives that the Ninth Circuit finds pertinent here is irrelevant because there is no less intrusive alternative test under the Fourth Amendment. (Petition p. 22.)

The en banc decision's express adoption of a less intrusive alternative test as a component in evaluating the reasonableness of an officer's use of force under the Fourth Amendment will necessarily spawn confusing and incorrect jury instructions, and protracted proceedings involving elaborate expert testimony purporting to establish what officers "should" have done to avoid use of a particular level of force under the circumstances. This is contrary to *Graham* and to the other decisions of this Court interpreting the Fourth Amendment and contrary to the decisions of the other Circuits. It is essential that this Court grant review.

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into a search"]. The Court then found the *seizure* to be unconstitutional because the checkpoints were not directed to any particular criminal threat. In *Bond v. United States*, 529 U.S. 334 (2000), the Court did not find the seizure unreasonable because there were less intrusive means available to accomplish the goal. Rather, the case turned on the bus passenger's reasonable expectation of privacy with respect to physical inspection of a carry-on bag. 529 U.S. at 338-39. Nor do *Schmerber v. California*, 384 U.S. 757 (1966), *Winston v. Lee*, 470 U.S. 753 (1985) and *United States v. Place*, 462 U.S. 696 (1983) hold that the necessity for a particular manner of search or seizure is measured by the availability of less intrusive alternatives.

III.

CERTIORARI IS WARRANTED TO CLARIFY APPLICATION OF *TENNESSEE v. GARNER*, 471 U.S. 1 (1985) AND RESOLVE A CONFLICT AMONG THE APPELLATE COURTS CONCERNING THE DEFINITION OF DEADLY FORCE AND WHETHER USE OF A PROPERLY TRAINED POLICE DOG MAY CONSTITUTE DEADLY FORCE.

Respondent argues that the en banc decision does not warrant review, because it simply brings the Ninth Circuit "in line with other Circuits and law enforcement on the definition of deadly force," purportedly by adopting the Model Penal Code definition of deadly force. (Opposition p. 13.) That definition, in turn, defines deadly force as force which "creates a substantial risk of causing death or serious bodily injury." (App. 29, citing Model Penal Code § 3.11(2) (1962)). This definition necessarily encompasses even nonlethal force to the extent that the force would otherwise cause "serious bodily injury."

Respondent's desire to invoke that standard in this case is understandable given, as noted in the petition, the widely held view of the circuit courts that this Court's decision in *Tennessee v. Garner* creates a separate standard for evaluating "deadly force" under the Fourth Amendment and sharply limits application of such force even without consideration of the other *Graham* factors. (Petition pp. 23-24.) Respondent and, indeed, other plaintiffs will exploit the absence of any precise definition of "serious bodily injury" in an attempt to classify broad categories of force as "deadly force" for purposes of invoking *Garner*. For example, the Model Penal Code itself amorphously defines "serious bodily injury" to include "bodily injury which creates a substantial risk of death or

which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Model Penal Code § 210.0(3). And, as amici curiae point out, other statutory and regulatory definitions of the term are equally expansive, including force that leads to a "serious impairment of physical condition," including, but not limited to, loss of consciousness, bone fracture "impairment of function of any bodily member or organ; a wound requiring extensive suturing" or "requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." (Brief of Amici Curiae League of California Cities, California State Association of Counties and International Municipal Lawyers Association in Support of Petitioners, p. 16, citing California Penal Code § 243(f)(4) and Sentencing Guidelines for the United States Courts, 18 U.S.C.'s Appendix, § 1B1.1, Application Note 1.(L).) Virtually every application of force by a police officer which results in injury will therefore be subject to a debate as to whether it is "deadly force" under *Garner*.

To the extent *Garner* creates a special standard on use of deadly force, this Court clearly focused on deadly force in its literal sense – force which is likely to cause death. (Petition pp. 24-25.) Moreover, none of the Circuits which have purported to adopt the Model Penal Code definition of deadly force considered the question of whether nonlethal force capable of causing only serious bodily injury constituted deadly force under *Garner*. All of the cited cases involved application of force that was quintessentially capable of causing death or actually cause death, everything from discharging a firearm to dropping a bomb on a building. (*See* Petition p. 27.) And, while respondent trumpets the fact that the City of Hemet and many police

agencies define deadly force as force that is substantially likely to cause death or a serious injury, those standards simply recognize that by its nature lethal force is necessarily capable of causing serious bodily injury even if its application does not lead to death in a particular instance. Quite simply, lethal force is virtually always capable of causing serious bodily injury. However, the converse is not true, i.e., force capable of causing serious bodily injury is not necessarily substantially likely to cause death. This is why various types of force are not categorized as deadly force by police agencies notwithstanding deadly force being defined as force capable of causing death or serious injury. As the en banc opinion acknowledged here, in fact, the City of Hemet use of force policy did not classify use of a police service dog as deadly force, but rather as "intermediate force." (App. 20.) Conspicuously absent from the litany of professional police standards respondent cites as adopting the Model Penal Code definition of deadly force is any standard which defines deadly force as including use of a canine or any other force that is nonlethal.

The Ninth Circuit's holding that application of nonlethal force, more particularly, use of a canine, that might cause serious bodily injury may constitute use of deadly force under *Garner* is in direct conflict with the Eighth Circuit's decision in *Kuha v. City of Minnetonka*, 365 F.3d 590, 598 n.3 (8th Cir. 2004). Smith attempts to sidestep this express conflict by arguing that the Eighth Circuit's holding in *Kuha* is dicta because it also rejected liability under the Model Penal Code definition of deadly force, and that it is contrary to the Eighth Circuit's en banc decision in *Mattis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976), *vacated as moot sub nom., Ashcroft v. Mattis*, 431 U.S. 171 (1977). Neither ground withstands

scrutiny. The *Kuha* court expressly declined to apply the Model Penal Code definition and instead adopted the Ninth Circuit's prior decision in *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998). *See* 365 F.3d at 598 n.3. This is not dicta. Nor was the *Kuha* court bound by the Eighth Circuit's prior en banc decision in *Mattis*. First, the decision in *Mattis* was vacated as moot following this Court's grant of certiorari. Second, *Mattis* is a pre-*Garner* case and therefore the Court did not have occasion to interpret the meaning of deadly force in the context of *Garner's* Fourth Amendment analysis. Third, *Mattis* involved application of quintessentially deadly force – discharge of a firearm by a police officer – and does not purport to hold that nonlethal force that may cause serious bodily injury necessarily constitutes deadly force under the Fourth Amendment.

The Ninth Circuit's decision also conflicts with the decision of other federal appellate courts concerning whether use of a trained canine to bite and hold a suspect constitutes deadly force under *Garner*. Respondents argue that the Ninth Circuit left the issue open, remanding to the district court for presentation of evidence as to whether use of a canine is capable of causing serious bodily injury and, hence, constitutes deadly force. (Opposition pp. 15-16.) But, there is no justification for such a remand. Applying this Court's decision in *Garner*, and recognizing its limited application solely to lethal force, the First, Eighth and Sixth Circuits have expressly held that use of a canine to bite and hold a suspect does not constitute deadly force under *Garner*. (Petition p. 29.) It is only the Ninth Circuit's distorted application of this Court's decision in *Garner* that leaves the issue "open" at all.

The Ninth Circuit's holding that nonlethal force that is capable of causing serious bodily injury may constitute deadly force under *Garner* creates confusion not simply with respect to application of a canine to restrain suspects, but also application of a wide variety of nonlethal force by police officers. The result will be endless litigation on the question of whether a particular use of force may cause "serious bodily injury", and hence allow the plaintiff to shortcut the *Graham* factors by invoking *Garner*. This protracted litigation will have a direct adverse impact on the courts, and also on the day-to-day ability of police officers to evaluate their use of force in light of what had been clear constitutional standards. The Ninth Circuit's decision is contrary to the decisions of this Court in *Garner* and *Graham*, as well as the decisions of other federal circuit courts. It is necessary for this Court to grant review.

Respectfully submitted,

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Supreme Court of the United States

CITY OF HEMET, DAVE QUINN, AARON MEDINA, DANIEL REINBOLT, NATE MILLER, PETER HEWITT, LEE EVANSON and HEMET POLICE DEPARTMENT,

Petitioners,

vs.

THOMAS SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are the League of California Cities, the California State Association of Counties, and the International Municipal Lawyers Association.[1,2] The League of California Cities is an association of 476 cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all 16 divisions of the League from all parts of the State. The committee monitors appellate litigation affecting municipalities and identifies those cases that are of statewide significance.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The International Municipal Lawyers Association is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their

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[1] No counsel for a party authored this brief in whole or in part and no person or entity, other than the *amici curiae*, their members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Both the petitioners and the respondent granted their consent to the filing of this *amici curiae* brief, and their letters of consent are being filed with the Court contemporaneously with the filing of this brief.

chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The cities and counties of California and the Ninth Circuit, whose interests are represented and protected by the *amici curiae*, will be significantly affected by the changes in existing law wrought by the Ninth Circuit's decision in this case. If allowed to stand, this decision will directly impact the manner in which their law enforcement officers will be expected to conduct themselves, the manner in which those officers will have to be trained, and the potential liability these local governments may face for actions by their peace officers. Each of the *amici curiae* believes that the Ninth's Circuit's decision in this case amounts to bad public policy which is contrary to this Court's prior decisions, and accordingly they urge this Court to grant the petition for writ of certiorari to reverse this erroneous decision by the Ninth Circuit.

I. THE NINTH CIRCUIT'S APPLICATION OF *HECK* WILL DISRUPT THE CRIMINAL JUSTICE SYSTEM, CREATE TENSIONS BETWEEN CIVIL AND CRIMINAL ATTORNEYS, AND IMPOSE NEW BURDENS ON THE POLICE

The petitioners have ably discussed why the Ninth's Circuit's decision in this case conflicts with this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994), so the

amici will take this opportunity to advise this Court of several adverse consequences that they believe will flow from the Ninth Circuit's decision if it is allowed to stand.

The core of the Ninth Circuit's decision on this issue is found in its comment that "[b]ecause we are unable to determine 'the factual basis for [Smith's] plea,' his lawsuit does *not* necessarily imply the invalidity of his conviction and is therefore not barred by *Heck.*" (*Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir. 2005); emphasis in original; citations omitted.) The corollary that flows from this conclusion is obvious: in order for local governments to avoid civil liability resulting from the same conduct for which a criminal defendant has plead guilty, a detailed factual basis for the plea must be placed in the criminal record. But while easily stated, such a policy will be extraordinarily difficult to put into effect.

Our criminal justice system is dependent on plea bargains. The system would collapse if every criminal charge could only be resolved by means of a full trial. And the vast majority of criminal defendants prefer to work out a plea arrangement rather than face the uncertainty inherent in a trial. But incorporating the Ninth Circuit's *Smith* decision into that process will thoroughly disrupt it.

Prior to this decision, if the state and the criminal defendant are able to reach an agreement on a plea, it was not necessary for the prosecution to place on the record a lengthy factual foundation for the charges, nor was the trial court obliged to make explicit factual findings regarding the offense charged. (See discussion in Petition for Writ of Certiorari at pages 9-10.) In the wake of *Smith*, the simplicity and efficiency of this system has been turned against public entities. In order to create the necessary record, there will be a substantial increase in the time it will take to dispose of individual cases,

thereby significantly slowing an already crowded – indeed, over-burdened – criminal justice system.

If this decision stands, local governments employing the law enforcement officers who bring the criminal suspects to the prosecutors will have a vested interest in having extensive factual inquiries conducted even when there is a plea agreement, in order to forestall future plaintiffs from arguing, as has the respondent here, that his or her plea did not encompass each and every aspect of the criminal charges laid against him or her. Since local governments will not know in advance which of the suspects may decide to later pursue a civil lawsuit, they will, out of an abundance of caution, urge that these lengthy inquiries be conduced in *every* criminal case. If that request were to be honored, it would either bring the criminal justice system to a grinding halt or exponentially increase the cost of operating that system.

These demands will inevitably create significant tensions between prosecutors and other local government officials. Prosecutors obviously have an interest in the criminal justice system operating efficiently and have no desire to spend their time engaging in actions unnecessary to the accomplishment of *their* goals: the identification, conviction, and appropriate punishment of lawbreakers. It simply is not their job to defend the civil law interests of the various local governments with which they may come in contact (or even by which they may actually be employed).

And this tension between the civil and criminal halves of the system will not exist solely on the prosecutorial side. The state's inevitable reaction to the Ninth Circuit's decision will impose new burdens on, and create new conflicts for, criminal defense counsel.

Criminal defense attorneys have an ethical obligation to protect their client's best interests. That unquestionably

includes the obligation to incorporate into any plea agreement as many of the allegations of criminal conduct made against their client as possible. Prior to the *Smith* decision, that was a fairly uncomplicated process, accomplished simply by agreeing to a broad, undifferentiated plea to the charges brought by the state. (See Petition for Writ of Certiorari at pages 10-11.) But that will change if prosecutors, at the urging of local governments, start insisting that a detailed recitation of the facts underlying the plea be made in each case.

Under those circumstances, the criminal defense attorney will have to evaluate the potential consequences each portion of such a recitation may have on any *civil* claim the criminal defendant might be able to pursue. This will require criminal defense attorneys to engage in analyses for which they may have no training or experience. It will also require that the criminal defense attorney advise his or her client that any allegation left out of the recitation may result in new and separate charges being brought against the suspect. (See, e.g., discussion in dissent in *Smith, supra,* 394 F.3d at 709.) If the criminal defendant ultimately decides that he or she does not wish to endanger his or her possible civil case by agreeing to the factual recitation as proposed, the criminal defense attorney will then have to negotiate with the prosecutor to attempt to limit the scope of the factual recitation, leading to the absurd result that the prosecutor and defense counsel will be negotiating about the resolution of a criminal matter on the basis of its possible effect on a hypothetical future *civil* lawsuit. The criminal justice system has enough problems without turning it into the step-child of the civil law system.

Any change in the criminal justice system that requires extensive factual findings in every criminal prosecution will also impose new burdens on law enforcement. Prior to *Smith*, prosecutors, in negotiating pleas, were able

to rely on the written reports of the officers. But these reports were never meant to be the functional equivalent of testimony; they are not moment-by-moment, blow-by-blow descriptions of the events. If detailed factual recitations are going to be required with every plea, then either those reports are going to have to become much more detailed and extensive, or officers will actually have to testify on the record as part of the plea. Either route will result in officers spending far less time on the street doing their jobs protecting the public.

All of these negative consequences flow from the Ninth Circuit's interpretation of *Heck* as imposing *on the public entity defendants* the burden of proving that the prosecution of the plaintiff's 42 U.S.C. § 1983 claim "would *necessarily* imply or demonstrate that the plaintiff's earlier conviction was invalid." (*Smith, supra,* 394 F.3d at 699.). It makes far better public policy to put the burden on *the plaintiff* (the former criminal defendant) to show that success on his or her section 1983 claim "would *not* necessarily impugn his conviction." (*Ibid.*; emphasis added.) (The question of which party would have the burden of proof on this issue was not addressed in *Heck*.)

The criminal defendant is the only one who can decide whether he or she may have a civil claim against the arresting officers, and he or she is the only one who can decide whether to risk that possible claim in order to secure a favorable plea bargain. Nothing in the pre-*Smith* system precluded a criminal defendant from limiting his or her plea to specific acts, thereby leaving unaffected any civil claims he or she might have relating to other actions taken by the suspect and/or the arresting officers. The only limitation was whether the prosecutor was willing to agree to such a plea. Thus, any dispute over the scope of a plea, or the need for detailed factual recitations, would be limited to the handful of cases where the suspect was interested in preserving his or her possible civil claim.

Thus, there would be no need of changing the entire system.

Finally, although the Ninth Circuit, in its opinion, suggested that its analysis of the *Heck* rule applies only to situations where the plaintiff was convicted pursuant to a plea, rather than by a jury verdict, there is no reason to expect that distinction to survive for very long. The very rationale offered by the Ninth Circuit for this distinction is contrary to the analysis used by the Court to support its decision in favor of the respondent on the *Heck* issue.

> "Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction. Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would 'necessarily imply the invalidity of his conviction.'" (*Smith, supra,* 394 F.3d at 699, fn. 5; citations omitted.)

But a guilty plea similarly "does not determine which specific act or acts form the basis for the conviction" – in fact, that is the cornerstone of the Ninth Circuit's decision on this issue. But then, why doesn't the guilty plea too, like the jury verdict, "necessarily determine[] the lawfulness of the officers' actions throughout the whole course of the defendant's conduct"? The only way the Ninth Circuit will be able to resolve this inconsistency would be to reject one or the other of its positions, and there can be little doubt that, when ultimately confronted with this issue, it will reject the inconsistency embodied in footnote 5. That will mean that explicit fact finding will be required not only at the time of a plea, but also by the jury when it reaches a verdict.

If this comes about, it will be the end of the general verdict in criminal trials. Both prosecutors and defense counsel will insist on jurors explicitly resolving every disputed fact, in order to ensure that in any subsequent civil action the parties will be able to conclusively show that the jury did, or did not, resolve specific issues against the plaintiff/criminal defendant, thereby determining whether *Heck* can be applied to claims arising from that issue. So, if this decision is allowed to stand, not only may there be more criminal trials (as civil concerns prevent successful plea negotiations), those trials will take longer, as jurors are required to work their way through lengthy special verdict forms.

Placing the burden on the plaintiff to show that his or her claims are not precluded under *Heck* will impose little burden on the plaintiff or the justice system. Placing that burden on the defendant local governments, as the Ninth Circuit has done in this case, will create immense burdens on both those local governments and the criminal justice system. Accordingly, the *amici curiae* urge this Court to accept this case in order to resolve this important policy issue.

II. THE NINTH CIRCUIT'S REQUIREMENT THAT PEACE OFFICERS' USE OF FORCE WILL BE DEEMED REASONABLE ONLY IF IT CONSTITUTES THE LEAST INTRUSIVE ALTERNATIVE IS CONTRARY TO EXISTING LAW, WILL UNDERMINE THIS COURT'S *SAUCIER* DECISION, AND WILL GREATLY ENDANGER PEACE OFFICERS

This Court, in *Graham v. Connor,* 490 U.S. 386 (1989), set out the standards for evaluating whether a peace officer's use of force was reasonable. But the Ninth Circuit expands on this Court's holding, adding that "[i]n some

cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider." (*Smith, supra,* 394 F.3d at 701.) The Court does not explain how it can reach this decision without overruling – or even commenting – on its own contrary decision, *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994), in which the Court wrote that:

> "Plaintiff argues that the officers should have used alternative measures before approaching and knocking on the door where Scott was located. But, as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment." (Citations omitted.)

This analysis, now apparently repudiated by the Ninth Circuit, flows logically and directly from this Court's similar discussion in *Graham.*

> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the

> fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." (*Graham, supra,* 490 U.S. at 396-397.)

The Ninth Circuit's new standard, as embodied in the *Smith* decision, now not only permits, but essentially requires, the application of "the 20/20 vision of hindsight." Now, every use of force case will "entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment" (*Scott, supra,* 39 F.3d at 915), because it is impossible to conceive of a situation where a plaintiff will not be able to at least argue that there existed a less intrusive alternative to the use of force.

The net effect of this will be to undermine this Court's decision in *Saucier v. Katz,* 533 U.S. 194 (2001). In *Saucier*, this Court reversed the Ninth Circuit's decision, commenting that:

> "The approach the Court of Appeals adopted – to deny summary judgment any time a material issue of fact remains on the excessive force claim – could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." (*Id.* at 202; citations omitted.)

But by creating a least intrusive alternative requirement for excessive force cases, the Ninth Circuit has once again made it impossible to obtain qualified immunity summary judgments on excessive force claims. This Court made clear in *Saucier* that such a result was unacceptable.

If, despite all this, the Ninth Circuit's new rule is allowed to stand, it will significantly increase the danger facing peace officers. As Judge Kozinski wrote in *Scott*, "[i]mposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves." (*Scott, supra,* 39 F.3d at 915.)

> "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only." (*Ibid.*)

The end result of such interference with the ability of peace officers to respond to ever-evolving and quickly changing situations will be the injury and death of some of those officers. As it is, more than three officers a week are dying in the line of duty, and an officer is being assaulted while on the job approximately every 9 minutes.[3] Appallingly high as these numbers are, one can only shudder to imagine how much higher they will be if officers are forced to delay responding to dangerous situations because they are trying "to find and choose the least intrusive alternative".

It is perfectly appropriate to hold peace officers to the straight-forward *objective* standard for the use of force established by this Court in *Graham.* Officers can be

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[3] Derived from statistics for the years 1993-2004 compiled by the Federal Bureau of Investigation and the National Law Enforcement Officers Memorial Fund, Inc., as found on the Fund's website, located at http://www.1nleomf.com/TheMemorial/Facts/daifacts.htm.

trained to understand and apply that standard, and if they comply with that standard, neither they, nor their employer, will, or should, be held liable on a claim that the use of force was excessive. But no officer can be trained to anticipate how a Monday-morning quarterback will analyze his or her actions, or to instantaneously recognize each and every alternative available to respond to a situation and immediately choose that one which, in calm hindsight, some expert will opine was the "least intrusive alternative" available. We already ask an enormous amount from our peace officers. Let's not ask them to do the impossible.

Accordingly, the *amici curiae* urge this Court to accept this case in order to derail this dangerous development in the law.

III. THE NINTH CIRCUIT'S ADOPTION OF THE MODEL PENAL CODE'S DEFINITION OF DEADLY FORCE CREATES AN UNWORKABLE STANDARD FOR LAW ENFORCEMENT, ONE THAT WAS NEVER INTENDED BY THE DRAFTERS OF THE MODEL PENAL CODE

In *Smith*, the Ninth Circuit overruled its earlier decision of *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998), in which the Court had defined "deadly force" for the purposes of the application of the rule limiting the use of such force set out by this Court in its decision in *Tennessee v. Garner*, 471 U.S. 1 (1985). Rejecting the *Vera Cruz* court's definition of such force as "force reasonably likely to kill" (*Vera Cruz, supra*, 139 F.3d at 660), the Ninth Circuit instead held "that in this circuit 'deadly force' has the same meaning as it does in the other circuits that have defined the term, a definition that finds its origin in the Model Penal Code. We define deadly force as force that creates a substantial risk of causing death or

serious bodily injury." (*Smith, supra,* 394 F.3d at 693.) But this is not a use for which the Model Penal Code was ever intended.

A. The Model Penal Code's Definition Of Deadly Force Was Not Intended For Use In Civil Cases Such As This

The Ninth Circuit's reliance on the Model Penal Code's (hereafter referred to as the "MPC") definition of deadly force reflects a fundamental misunderstanding of the purpose of the MPC.

The MPC is a *criminal* code, not a civil code. "The main aim of a criminal code is to differentiate conduct that warrants *criminal* sanctions from conduct that does not." (*Model Penal Code and Commentaries (Official Draft and Revised Comments)*, Part I, General Provisions, §§ 3.01 to 5.07 (1985) (American Law Institute, Philadelphia, PA) [hereafter referred to as the "*MPC Commentaries*"], page 4; emphasis added.) The drafters were not seeking to establish a civil standard for appropriate conduct (see *Model Penal Code: Official Draft and Explanatory Notes* (1985) (American Law Institute, Philadelphia, PA) [hereafter referred to as the "*MPC Official Draft*"], Section 3.01(2)), and felt free to deviate from those standards when they deemed it appropriate for reasons of "sound legislative policy". (*MPC Commentaries,* page 2.)

The MPC does indeed offer a definition of "deadly force", as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." (*MPC Official Draft*, Section 3.11(2).) Section 3.11 is the "Definitions" section for Article 3 of the MPC – "General Principles of Justification". "This article formulates justification for conduct that otherwise would constitute an offense, to the extent that it has seemed feasible to do so in general

terms." (*MPC Commentaries*, page 1.) The definition of "deadly force" contained in Section 3.11(2) is a unitary definition for *all* of Article 3 of the Code, not just the section dealing with the use of force by police officers. The ten other sections of Article 3 provide the details of the affirmative defense of justification to criminal charges. Section 3.07 covers the "Use of Force in Law Enforcement".

Section 3.07(2)(b) sets out the MPC's standards for the use of deadly force by police officers. In the drafters' lengthy commentary on this section, a constant refrain is their concern over the use of *firearms* by law enforcement. (See, e.g., *MPC Commentaries*, page 111 ["*shoot* to prevent the escape"]; page 115 ["reckless use of *firearms*"]; page 116 ["in an age of *firearms*"]; all emphasis added.)

The drafters consistently discuss deadly force as that which would result in the death of the suspect. They note that the common law rule permitted the "*killing* of a resisting or fleeing felon" because virtually all felonies originally were punishable by death. (*MPC Commentaries*, §3.07, page 113.) Now, however, "[r]elatively few crimes are punishable by death." (*Ibid.*) They also retreat from the common law rules "that allowed the *killing* of criminals" in order to prevent the commission of crimes (*id.* at 132), finding instead that "resort to the privilege to *kill* in crime prevention will rarely be necessary." (*Id.* at 133.) (All emphasis added.)

In short, the drafters of the MPC were concerned with actions taken by police officers that might result in the *death* of criminal suspects, and sought to establish principles for the use of such deadly force. They established these principles in the context of a *criminal* code, to clarify the circumstances under which police officers might be *criminally prosecuted* for their conduct, *not* to establish standards for determining whether the officers could be

held civilly liable for that conduct. As the drafters themselves commented:

> "The police must make a practical and often hasty decision whether or not they are dealing with a person who may be a dangerous criminal in the sense of being a threat to life or limb. They are accustomed to making such decisions, and would rarely be *prosecuted* save in the most egregious of situations." (*MPC Commentaries*, §3.07, page 124; emphasis added.)

As the *Vera Cruz* opinion noted, "[t]he MPC's definition and *Garner*'s deadly force rule serve entirely different purposes: The MPC is designed to govern criminal liability; *Garner*'s deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment." (*Vera Cruz, supra,* 139 F.3d at 662.) The Court continued:

> "We decline to put police doing their jobs in the same category as criminals doing theirs. Because criminal activities serve no legitimate purpose, there is no reason to spare criminals from even remote consequences of their actions; deterrence, by forcing criminals to assume responsibility for all the harm they cause by their anti-social conduct, is the very essence of criminal law. Law enforcement personnel, by contrast, serve important purposes; the risk of personal liability, if taken beyond its proper scope, may make police timid and deter activities necessary for our protection. Criminals, moreover, can largely control the circumstances of their crimes and thus minimize the risk that force will be necessary; law enforcement personnel must take the situation as they find it." (*Ibid.*)

The MPC's definition of deadly force simply is not appropriate for use in civil cases such as this, and should not be utilized in circumstances for which it was never intended by its drafters.

B. The New Standard Adopted By The Ninth Circuit Is Unworkable, And Will Make It Impossible For Law Enforcement To Make Effective Use Of The Expanding Options Of Non-Lethal Weapons

Allowing this broad-reaching re-definition of deadly force to stand will have a monumental impact on law enforcement in the Ninth Circuit. If, as the *Smith* decision holds, the definition of deadly force includes any use of force that "creates a substantial risk of causing . . . serious bodily injury", then virtually every use of force by a law enforcement officer will be subject to a claim that it constitutes the use of "deadly" force. Simply looking at existing definitions of "serious bodily injury" reveals this. For example, California Penal Code § 243(f)(4) defines "serious bodily injury" to mean "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." Equally expansive is the definition in the Sentencing Guidelines for the United States Courts, which defines "serious bodily injury" to mean "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." (18 USC Appendix, §1B1.1, Application Note 1.(L).)

It certainly can be, and undoubtedly will be, argued that each and every tool utilized by law enforcement to assist in subduing and capturing criminals presents a "*risk*" of causing one or more of the injuries listed above. (E.g. Batons can break bones, chemical sprays can cause pain and impair breathing, various devices may cause loss of consciousness, etc.) In fact, it can be argued that even

the use of *unarmed* force presents such a risk. (E.g. Attempting to grab a running suspect may cause him or her to fall to the ground and suffer serious injury, thus arguably constituting the use of "deadly" force.) And any injury that involves any breaking of the skin creates a risk of infection, and infection has been deemed to constitute "serious bodily injury". (See *People v. Brown*, 234 Cal.App.3d 918, 931, 285 Cal.Rptr. 824 (Cal.Ct.App. 1991).)

It thus is hard to imagine *any* use of force that does not fit into one or more of the categories listed above, meaning that virtually every use of force becomes the use of *deadly* force. The *Vera Cruz* court commented on this possibility when it wrote that "the MPC's formulation, containing the disjunctive 'or,' would turn the deadly force rule into a 'serious bodily injury' rule, rendering *Garner*'s distinction between ordinary force and deadly force a virtual nullity. This is plainly not what the Supreme Court had in mind in *Garner*." (*Vera Cruz, supra,* 139 F.3d at 662.) Yet the *Smith* opinion is completely silent on this issue, and, by re-defining deadly force to include "serious bodily injury", has brought about the very result that was "plainly not what the Supreme Court had in mind in *Garner*."

The situations under which deadly force can properly be used are quite limited, meaning that now, in the Ninth Circuit, the circumstances under which law enforcement officers can use *any* force arguably will be limited to those narrow situations discussed in *Tennessee v. Garner*. Just how is law enforcement supposed to do its job when the criminals know that officers' hands have been tied in this manner?

The Ninth Circuit dismisses this concern by asserting that:

> "A definition including 'a substantial risk of bodily injury' is used by police in all fifty states, the District of Columbia, and Puerto Rico, and such use has not resulted in the difficulties we feared. . . . [I]t is the definition that California and the Hemet Police Department use. Adopting the common definition of deadly force should impose no more of a burden on law enforcement officials than already exists throughout the nation – a burden that most law enforcement officials have voluntarily chosen to impose upon themselves." (*Smith, supra,* 394 F.3d at 706.)

But there is a fundamental difference between standards that a law enforcement agency may voluntarily choose to adopt and standards compelled by the Fourth Amendment. Surely the Ninth Circuit would not agree that the agencies' standards would be determinative if they called for a greater freedom to apply deadly force than that permitted by the Constitution.

Further, the reality is that large numbers of cities and counties in California *have*, since 1998, explicitly defined "deadly force" in conformity with the language approved in *Vera Cruz*, and have trained their officers pursuant to that definition. The Ninth Circuit's decision has created grave concern among numerous law enforcement agencies and officers as to how they are to conduct themselves in regard to the use of force. In particular, they are at a loss to know how to utilize non-lethal weapons, since virtually all of those weapons potentially fall within the Ninth Circuit's new definition of "deadly force", notwithstanding the fact that they are specifically designed to *avoid* causing death.

Under the Ninth Circuit's new definition of deadly force, determining whether *any* use of force amounts to the use of "deadly" force depends on what happens to the suspect *after* the force is used. (See, e.g., the Court's brief discussion whether the use of a police dog constitutes the use of deadly force. *Smith, supra,* 394 F.3d at 707.) How

can a law enforcement agency give meaningful direction to its officers regarding the use of force, or train them in that use, if there is no way to know whether any particular use of force will or will not come within the Ninth Circuit's definition of deadly force? This standard is completely unworkable. The end result may well be that officers, instead of being able to defuse situations early, and with a minimal application of force, will be left no choice but to allow those situations to escalate until there is no question that deadly force can be used, which will result in far more injuries and death – to suspects, victims, officers, and bystanders.

In addition, this new standard too will undermine this Court's *Saucier* decision, because, as with the adoption of the "least intrusive alternative" requirement, the question of whether any particular application of force amounts to the use of "deadly" force will become a question of fact. In this way too, then, the Ninth Circuit will have created a situation where qualified immunity summary judgments will be impossible to obtain on excessive force claims. As noted earlier, this Court made it clear in *Saucier* that such a restriction was unacceptable.

Accordingly, the *amici curiae* urge this Court to accept this case in order to reverse this dangerous change in the law.

CONCLUSION

The Court of Appeals in this case has turned existing law in the Ninth Circuit upside-down. Well-established standards governing the manner in which law enforcement interacts with the public have been jettisoned, and replaced with dangerous and unworkable alternatives. The Court has additionally put at risk the efficient functioning of the criminal justice system. These developments are of deep concern to the *amici curiae*, and to

the citizenry of the State of California and the rest of the Ninth Circuit. The *amici curiae* accordingly urge this Court to accept this case for hearing in order to resolve the critically important policy issues inherent in the Ninth Circuit's decision in this case.

Respectfully submitted,

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